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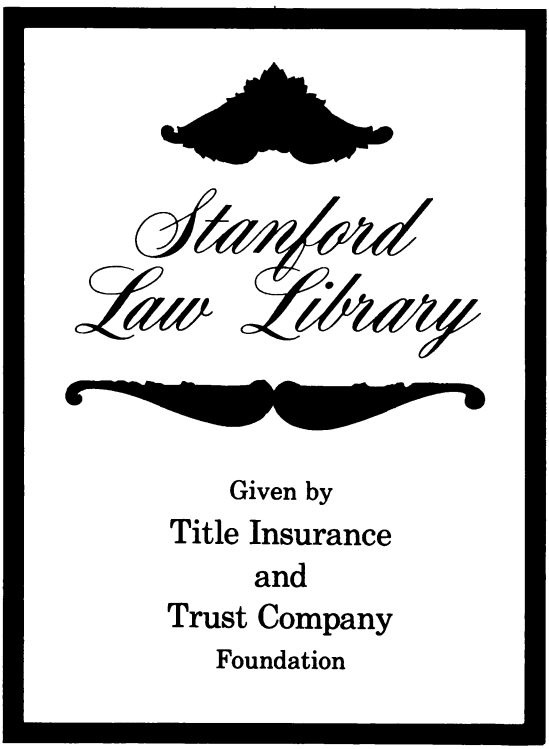
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OF

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UNDER

The Trustee Act 1888, The Trust Investment Act 1889
The Trustee Act 1893
The Trustee Act 1893 Amendment Act 1894, and
The Judicial Trustees Act 1896

WITH

EXPLANATORY NOTES, THE RULES OF COURT UNDER THE TRUSTEE ACT 1893 AND THE JUDICIAL TRUSTEES ACT 1896, A COMPLETE LIST OF TRUST INVESTMENTS, NUMEROUS FORMS, AND AN INDEX

BY

ARTHUR REGINALD RUDALL

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AND

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OF LINCOLN'S INN, BARRISTER-AT-LAW

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PREFACE TO THE SECOND EDITION.

SINCE the publication of the First Edition of this book in 1894 two Acts have been passed affecting the Law of Trusts and Trustees:—The Trustee Act 1893 Amendment Act, 1894, which, as its title indicates, amends the Trustee Act of 1893; and The Judicial Trustees Act, 1896, which introduces the novel feature of a Judicial Trustee of private trusts, and also permits the Court to relieve a trustee wholly or partially from liability for a breach of trust, when he has acted honestly and reasonably.

A considerable number of cases bearing on The Trustee Act, 1893, have also been decided, and references to these will be found in the notes on the Sections of the Act to which they relate. The Explanatory Notes have been revised, the Forms have been increased in number, and a complete list of Trustee Investments (for the drawing up of which we are indebted to Mr. JOHN WHEELER CANEY, of the Stock Exchange) has been added.

In Appendix VI. will be found the Sections (with notes) of The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), dealing with the appointment of "a Real Representative." The personal representatives of a deceased person are, by Section 2 of that Act, declared trustees of the deceased's real estate for the persons by law beneficially entitled thereto, and are constituted the deceased's real representatives. This Act, it should be noted, came into operation on 1st January, 1898.

It is hoped that in its present form the book will prove a convenient work of reference on the Trustee Acts and a useful compendium of Trust Law.

A. R. RUDALL,
J. W. GREIG,

3 NEW SQUARE, LINCOLN'S INN,
1st February, 1898.

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ABBREVIATIONS OF REFERENCES TO REPORTS.

Amb.	Ambler's Reports.
Anst.	Anstruther's Reports.
App. Cas.	Appeal Cases.
Atk.	Atkyn's Reports.
B. & C. *or* Barn. & Cress.	Barnewall & Cresswell's Reports.
Bail Ct. Cas.	Bail Court Cases.
Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bro. C. C.	Brown's Chancery Cases.
Campb.	Campbell's Reports.
Ch. Ca.	Cases in Chancery.
Ch. D.	Chancery Division.
Cl. & Fin.	Clark & Finnelly's Reports.
Cr. & Ph.	Craig and Phillips's Reports.
D. & C.	Deacon & Chitty's Reports.
D. & S.	Doctor & Student.
De G. F. & J.	De Gex, Fisher & Jones's Reports.
De G. & J.	De Gex & Jones's Reports.
De G. J. & S.	De Gex, Jones & Smith's Reports.
De G. M. & G.	De Gex, Macnaghten & Gordon's Reports.
De G. & Sm.	De Gex & Smale's Reports.
Dr.	Drury's Reports (Ireland).
Dr. & S.	Drewry & Smale's Reports.
Dr. & Wal.	Drury & Walsh's Reports (Ireland).
Drew.	Drewry's Reports.
Dru. & War.	Drury & Warren's Reports (Ireland).
Eq. Rep.	Equity Reports.
Exch.	Exchequer Cases (Welsby, Hurlstone & Gordon's Reports).
Exch. D.	Exchequer Division.
H. L. C.	House of Lords Cases.
Ha.	Hare's Reports.
Hem. & M.	Hemming & Miller's Reports.
Ir. Law & Eq.	Irish Law & Equity Reports.
Ir. Eq. R.	Irish Law & Equity Reports.
J. & W.	Jacob & Walker's Reports.
J. & H.	Johnson & Hemming's Reports.
Johns.	Johnson's Reports.
Jon. & Lat.	Jones & Latouche's Reports (Ireland).
Jur.	Jurist.
Jur., N. S.	Jurist (New Series).
Kay	Kay's Reports.
K. & J.	Kay & Johnson's Reports.
L. J.	Law Journal.

L. T., N. S., Ch.	Law Times (New Series), Chancery.
L. T.	Law Times (Old Series).
L. R., C. P.	Law Reports, Common Pleas.
L. R., Ch.	Law Reports, Chancery Appeals.
L. R., Ir.	Law Reports, Ireland.
Lloyd & G.	Lloyd & Goold.
M. & G.	Macnaghten & Gordon's Reports.
M. & W.	Meeson & Welby's Reports.
Madd.	Maddock's Reports.
Mont. & A.	Montagu & Ayrton's Reports.
Mont. & M'A.	Montagu & McArthur's Reports.
Mos.	Moseley's Reports.
My. & Cr.	Mylne & Craig's Reports.
My. & K.	Mylne & Keene's Reports.
N. R.	New Reports (by Bosanquet and Fuller).
P. Wms.	Peere Williams.
Ph.	Phillips's Reports.
Phillim.	Phillimore.
Q. B. D.	Queen's Bench Division.
R.	The Reports.
Rose	Rose's Reports.
R. S. C.	Rules of Supreme Court.
Russ.	Russell's Reports (Chancery).
Russ. & My.	Russell & Mylne's Reports.
Ry. & Mo.	Ryan & Moody's Reports.
S. C.	Same Case.
Salk.	Salkeld.
S. & S.	Simons & Stuart's Reports.
Sel. C. Ca.	Selwyn's Select Cases in Chancery.
Sim.	Simon's Reports.
Sm. & G.	Smale & Giffard's Reports.
Sm. & Giff. App.	Smale & Giffard's Appendix.
Sol. J.	Solicitors' Journal.
Sw.	Swanston.
Swab.	Swabey's Admiralty Reports.
Vern.	Vernon's Reports.
Ves.	Vesey's Reports.
Ves. & Bea.	Vesey & Beames's Reports.
Ves. Sen.	Vesey Senior's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
White & Tudor L. C.	White & Tudor's Leading Cases.
Y. & C. Exch.	Younge & Collyer's Exchequer Equity Reports.
Y. & C. C.	Younge & Collyer's Chancery Cases.
Y. & Jerv.	Younge & Jervis's Exchequer Reports.
[1897] App. Cas.	[1897] Appeal Cases (or as may be).

ADDENDA ET CORRIGENDA.

Page 84, line 9. After 2 Ch. 261, add "see also *re* Pixton and Tong's Contract, W. N. [1897] 178 (5)."

Page 93, line 31. W. N. [*1865*] *2* should be W. N. [*1866*] *5*.

Page 96, line 43. After *re* Burgess's Trusts, insert (W. N. [1877] 87).

Page 96, line 28. For *re Simpson, W. N.* [*1897*] *105*, read *re Simpson, W. N.* [*1897*] *105 and* [*1897*] *1 Ch. 256*.

Page 99, line 37. For Eaton *v. Davies* read Eaton *v. Daines*.

Page 111, line 26. For 50 & 51 Vict. *c. 78*, read *c. 73*.

Page 133, line 4. *Re* Graham's Trusts [1891], *1 Ch. 51*, should be [1891], *1 Ch. 151*.

Page 148, line 36. After *re* Gilson, Gilson *v.* Gilson, insert (W. N. [1894] 43).

Page 149. [And see also p. 298.] At end of note to Section 45 add—

The case of *re* Holt, *re* Rollason, Holt *v.* Holt ([1897] 2 Ch. 525), raises the question whether it is necessary in a case where contribution is claimed against a beneficiary who is a co-defendant, to serve a notice under Order XVI., Rule 55. There, in an action by beneficiaries of a settlement against the tenant for life and the executors of the deceased trustees of the settlement, the plaintiffs by their statement of claim alleged that the deceased trustees had in breach of trust advanced the trust funds to the tenant for life and her husband. The executors by their defences admitted the breach of trust, but alleged that it was committed at the instigation and request, and with the consent in writing, of the tenant for life, and claimed that her life interest ought to be impounded under Section 45 of The Trustee Act, 1893, by way of indemnity to the estates of the deceased trustee. No notice was given by the executors to the tenant for life under Order XVI., Rule 55, that they claimed contribution or indemnity against her. At the trial of the action leave was given to the executors, without going into evidence, to apply in chambers with reference to enforcing their rights (if any) to indemnity against the tenant for life. Byrne, J., said that the allegation in the pleadings that the breach of trust was committed at the instigation and request, and with the consent in writing, of the beneficiary was a sufficient ground to enable the Court to give the representatives of the deceased trustees (who in their pleadings had made this allegation) liberty to apply in chambers with reference to enforcing such right. The form of order made in this case is given in the report above cited at page 530.

Page 151, line 4. For Interpretation Act, *1888*, read Interpretation Act, *1889*.

Page 160, line 41. For Eaton *v.* *Davies* read Eaton *v.* *Daines*.

Page 174. Add at end of note on Section 3, Sub-section 2, of The Judicial Trustees Act, 1896, the following:—

The case of *re* Kay, Morley *v.* Kay ([1897] 2 Ch. 518), shows that Section 3 of The Judicial Trustees Act, 1896, applies to the case of an executor who has committed a *devastavit*; but in construing that Section the Court is bound to remember the provisions of 22 & 23 Vict. c. 35, s. 29, and to see that there has been no undue delay in advertising for claims. The facts of the case are as follows:—A testator, who died in June, 1894, leaving assets amounting to £22,000 and debts, as then ascertained, of about £100, gave an immediate legacy of £300 to his widow. The executor paid this legacy, and allowed the widow to receive the income arising from the estate for the benefit of herself and family. In August following a claim for rents received by the testator as an agent and not accounted for was sent in; in November the usual advertisements for creditors were issued; in December an action claiming an account on the footing of wilful default by the testator was commenced. The executor, without going to the Court for directions, defended the action, and continued to allow the widow to receive the income till judgment in April, 1896, which resulted in some £26,000 being found due from the testator's estate to the plaintiffs. It was held that, though there had been undue delay in issuing the advertisements for claims, the executor had acted reasonably under all the circumstances in paying the £300 legacy and such further sums on account of income as were necessary to maintain the widow and family up to the issue of the writ, but not afterwards. To this extent he was relieved from personal liability.

Page 174, line 31. After Lockhart *v.* Reilly omit [1856].

INTRODUCTION.

THE TRUSTEE ACT, 1893, is a much-needed consolidation of the many existing Statutes relating to Trusts and Trustees, and, as a Code of Trust Law, cannot fail to be extremely useful to Trustees and their advisers, as well as to practitioners in the Courts. This book is an attempt to elucidate the provisions of the Act by the light of the decisions on the Acts repealed and re-enacted in the new Act, and of the various decisions on the Act itself, and the Authors hope that it will be found of assistance to Trustees and those called on to advise them.

It is one of the standing reproaches against English Law that its rules and principles are not to be found in any Code, or even body of Statutes, but are scattered through Acts of Parliament, books of reported decisions, and even the works of ancient text-book writers. To the layman the maze seems interminable, and it is only after years of training that the lawyer even knows where to find the law, and then the best part of his knowledge is but "index learning which turns no student pale." Efforts, however, have within the last fifty years been directed to simplifying and rendering the law more accessible. These efforts have proceeded on two main lines—first, by removing from the Statute Book legislation which has become incompatible with modern ideas, though still remaining part of the law, since no English Statute becomes obsolete merely by lapse of time; and, secondly, by codifying various branches of the law as time and opportunity have permitted. To the Statute Law Revision Committee is entrusted the first duty, while the latter has been undertaken by Parliament itself.

To codify the whole of the laws of England would be a herculean task, though there is, perhaps, some ground for thinking it not altogether an impossible one, in view of the great success which has attended the codification of law in India. The efforts of recent years, though piecemeal and halting in their mode of procedure,

have, nevertheless, it must be admitted, effected much, and give promise of more systematic and extended work in the future. The Lands Clauses Act, 1845; The Bills of Exchange Acts, 1882 to 1892; The Companies Acts, 1862 to 1893; The Partnership Act, 1890; and The Sale of Goods Act, 1893, are instances of attempts at codification and consolidation.

Codification of any branch of law, to be complete and perfect, should extend not only to collection and actual re-enactment, but should also be accompanied by a legislative provision that decided cases are not to be taken as laying down the law, as they virtually do at present, but are to be used as mere aids in construing the text of the Code. But this view of codification has never been unreservedly adopted in England, and the law-makers will probably continue the work of legislation for the simplification of existing law in the same haphazard and partially effective way as hitherto.

The Acts which this book attempts to elucidate are directed to codifying the Law relating to Trustees so far as it at present exists in the form of Statutes. The Acts in question do not attempt to codify the principles which have been evolved by the decisions of Courts of Equity. The Notes, however, aim not only at elucidating the text of the Acts, but also at epitomising and explaining the general Law of Trusts as modified by recent legislation and the decided cases. These decisions must still be sought in the numberless volumes of Law Reports.

A Bill to Codify both the Statute Law and the Case Law relating to Trusts and Trustees was indeed introduced into Parliament some years ago, but failed to pass. The Trustee Act, 1893, is less ambitious, but its effect has been to expunge from the Statute Book a series of enactments ranging from 1796 down to 1893. That it was not made even more complete is regrettable, for it still leaves unrepealed Sections 1 and 8 of The Trustee Act, 1888, and Sections 1 and 7 of The Trust Investment Act, 1889, which might with advantage have been repealed and re-enacted in The Trustee Act, 1893.

The Act of 1893 (which is the principal Statute) is styled "An Act to Consolidate Enactments Relating to Trustees"; but, as a matter of fact, it here and there enacts new law, though more as a corollary and natural effect of codifying the old law, than as the result of deliberate intention to alter or extend that

law. For instance, Section 21, which replaces Section 37 of The Conveyancing Act, 1881, extends the powers of that Section to Administrators.

The Act is divided into four parts, as follows:—

PART I.—INVESTMENTS.

PART II.—VARIOUS POWERS AND DUTIES OF TRUSTEES.

PART III.—POWERS OF THE COURT.

PART IV.—MISCELLANEOUS AND SUPPLEMENTAL.

In Part I. Sections 1 to 7 are virtually a re-enactment of the extremely useful Trust Investment Act, 1889, which widened the powers of investment of trustees to a considerable extent.

Sections 8 and 9 are a re-enactment of the very valuable and important Sections 4 and 5 of The Trustee Act, 1888, which, combined with Sections 6 and 8 of that Act, effected a revolution in trust law as to the liability of trustees for breaches of trust, and the application to them of the Statute of Limitations. The serious depreciation in the value of real property which has taken place in recent years has brought to light many cases of investment by trustees where, with the best intentions, but with disastrous results to themselves or the beneficiaries, they had overstepped the line of caution laid down by Courts of Equity. The inability, too, of trustees to plead the Statute of Limitations as a defence to stale claims in respect of trusts had long been a source of considerable injustice.

It is popularly supposed that the true test of the conduct of a trustee in regard to investment and the other duties of his trust is, that he should act as an ordinarily cautious and prudent man would act in his own affairs; but it is constantly forgotten that Courts of Equity have endeavoured to define exactly in what manner such a person would, and should, act. For instance, in the matter of the advance of trust money on mortgage, the Courts, as long ago as 1836, laid down the rule that trustees ought not to lend more than two-thirds of the estimated value upon freehold agricultural property, or more than one half of the estimated value on house property; though it constantly occurs that persons acting for themselves leave a much smaller margin, without forfeiting their claim to be considered prudent and cautious investors.

Lindley, L. J., in a well-known case (*re* Whiteley, Whiteley *v.* Learoyd, 33 Ch. D. 347, at p. 355), while accepting the rule of the "ordinarily prudent man of business," expressed the opinion that, in applying it, care must be taken not to lose sight of the fact that the business of the trustee, unlike that which the ordinarily prudent man is supposed to be conducting for himself, is that of investing money for the benefit of persons who are to enjoy it at some future time, and not for the benefit of the person entitled to the present income.

The duty of a trustee is, not to take such care only as a prudent man would take if he had only himself to consider: it is rather to take such care "*as an ordinarily prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide*"—a standard far different from that popularly supposed to be the guide for trustees.

The difficulties of a trustee's position are very great, since on the one hand he is exposed to the importunities of beneficiaries desirous of increasing their income, even at the risk of insecure investment of the capital, and on the other hand are the Courts, enforcing with extreme rigour the law relating to the liability of trustees. The natural result has been that it is extremely difficult to induce responsible persons to undertake the burdensome and thankless office of trustee. In fact, the creation of a Public Trustee, to take over the management of trusts, would be a legislative achievement of lasting value. A step in this direction has been taken by the passing of The Judicial Trustees Act, 1896, which enables the Court to appoint a judicial trustee of trust funds, either alone or jointly with ordinary trustees. Moreover this Act (by Section 3) gives power to the Court to relieve trustees in cases of what may be called honest breaches of trust. The Act will be found fully commented on in its place.

The Act of 1888 (re-enacted in the Act of 1893 except as to Sections 1 and 8, which were left unrepealed) effected a beneficial revolution in the law relating to the liability of trustees; and now a trustee who may have invested in agricultural or house property (after having obtained the report of an able practical surveyor), which subsequently depreciates, or a trustee who advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller

sum than is actually advanced thereon, is in the former case not liable at all, and in the latter is liable to make good only the sum advanced in excess of the proper sum.

The Act of 1893 (Part II., Sections 10, 11, and 12) re-enacts the useful provisions of The Conveyancing Act, 1881, which dealt with the Appointment of New Trustees, and introduced the simple and effective method of transferring certain kinds of trust property from old to new trustees, known as the Vesting Declaration.

Sections 13, 14, 15, and 16 are also a re-enactment of parts of The Trustee Act, 1888, which effected some useful alterations in the law relating to Sales by Trustees.

Part III. of the Act deals with the Appointment of New Trustees and Vesting Orders. This portion is a very useful and valuable consolidation of the various Statutes dealing with the circumstances under which the Court can appoint new trustees, and the powers of the Court in actions relating to trust property generally; and Section 42 deals with the important question of Payment into Court of Trust Moneys. The Act consolidates a number of enactments on this matter, and the practice will no doubt be much simplified.

The remaining Sections of the Act of 1893 need not be adverted to, except to remark that the Definition Section seems to be at once clear and concise, and will compare very favourably with the long and intricate Definition Sections in the repealed Acts.

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THE TRUSTEE ACT, 1888.

(51 & 52 Vict., Chapter 59.)

An Act to Amend the Law relating to the Duties, Powers, and Liability of Trustees. [**24th December, 1888.**

The only Sections of The Trustee Act, 1888 (51 & 52 Vict. c. 59), left unrepealed by The Trustee Act, 1893 (see Section 51), are Sections 1 and 8, given below. Of The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), only Sections 1 and 7 are left unrepealed (see p. 17, *infra*), and these are dealt with in the notes to Section 1 of The Trustee Act, 1893 (*infra*, p. 24 *et seq.*).

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows: that is to say—

Short title, extent, and definition.

1. (1) This Act may be cited as The Trustee Act, 1888.

(2) This Act shall not extend to Scotland.

(3) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

(4) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Section 1.—The expression "Trustee" has for the purposes of the Act four meanings assigned to it: viz.—

(*a*) An Express Trustee.

(*b*) An Executor.

(*c*) An Administrator.

(*d*) A Constructive or Implied Trustee.

All these persons will accordingly have the powers, and be entitled to the protection, afforded by the Act, executors and administrators being placed on the same footing as trustees for the purposes of this Act.

What may be the exact meaning of "*a trustee whose trust arises by construction or implication of law*" will probably require judicial interpretation. A well-known text-writer, Lewin, in "On the Law of Trusts" (9th ed., p. 113, note 1), says, "The terms 'Implied Trusts by Operation of Law' and 'Constructive Trusts' appear from the books to be almost synonymous expressions"; and the learned writer defines an Implied Trust as "*one declared by a party not directly, but only by implication*"; while Trusts by Operation of Law "are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity"; and he divides them into (1) Resulting Trusts, as where an estate is devised to A. and his heirs upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; and (2) Constructive Trusts, which are trusts the Court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease. It seems clear, therefore, that if this division is adopted by the Courts, the Act will apply, amongst other cases, to the following constructive trusts: namely—where a person holds property on a precatory trust; where a person agrees for valuable consideration to settle or sell a specified estate; where property, whether real (Dyer *v.* Dyer, White & Tudor's L. C. 203) or personal (Elrand *v.* Dyer, 2 Ch. Cas. 36), has been conveyed to others than, or jointly with, the person who has paid the purchase-money. The actual operation of the Act in some of these cases will, however, be small. See for instances of trusts Soar *v.* Ashwell ([1893] 2 Q. B. 393), Warren *v.* Murray and Another ([1894] 2 Q. B. 648), and Wassell *v.* Leggatt ([1896] 1 Ch. 554).

This Act puts an end to the distinction drawn in equity between express and constructive trusts when applying the Statute of Limitations by analogy. Equity held that the former could not be barred, while the latter could (see *per* Bowen, L. J., Soar *v.* Ashwell [1893], 2 Q. B. 393 and 395). By virtue of this Act all trusts are put on the same footing, and will be barred after the lapse of the statutory period (see Section 8).

In *re* Lands Allotment Co. ([1894] 1 Ch. 616) directors of a company were held to be trustees whose trust arises "by construction or implication of law." If there has been misappropriation or fraud the Statute of Limitations does not apply. The Statute would now apply in such a case as *re* Sharpe, Masonic and General Life Assurance Co. *v.* Sharpe ([1892] 1 Ch. 154). As to when time begins to run in the case of directors see Sovereign Assurance Society *v.* Eardley Wilmot (37 Sol. J. 581).

The position of directors of a company with regard to liabilities for acts performed in that capacity appear clearly from the following passages which occur in the judgment of the Court of Appeal in *re* Lands Allotment Co. (*ubi supra*). Lindley, J.: "Although directors are not, properly speaking, trustees, yet they

have always been considered and treated as trustees of money which comes into their hands or which is actually under their control, and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees. . . ." Kay, L. J.: "As directors they are not trustees at all. They are only trustees *quâ* the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that *quâ* such fund they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Act, and therefore the 8th Section of the Act, which applies to all persons who come within this definition of trustees, does apply to exonerate these directors from that misapplication of funds for which otherwise, I assume, they would have been liable." Shortly, the facts of this case were as follows. The directors of the Lands Allotment Co., which had no power to invest its capital in the shares of other companies, in March, 1885, accepted fully paid up shares in the Building Securities Co. to the amount of £35,000 in discharge of a debt. This was referred to in the balance sheet of the Lands Allotment Co. as "Assets by the Building Securities Co.," and the entry was explained by the chairman at the general meeting in April, 1885, to mean that it represented the amount due from the Building Securities Co. for an estate purchased from the Lands Allotment Co. The same item was repeated in successive balance sheets till 1889. The investment was made without any fraudulent intent. The Lands Allotment Co. was wound up in 1893, and it was held that, assuming that the directors had been guilty of a breach of trust in investing the money in shares of the Building Securities Co., they were protected by the Statute of Limitations, and that there had been no such fraudulent concealment on their part, notwithstanding the false statement by the chairman at the meeting, to prevent time from running under the Statute.

In *re* Cornish (W. N. [1895] 152) it seems to have been decided that Section 8 of this Act either does not apply to a trustee in bankruptcy who is an officer of the Court, or that, if it does, it does not operate to bar against such a trustee enforcement of an order to account.

"Trustee," by virtue of Sub-section 4, throughout the Act applies not only to a sole trustee, but also to two or more acting jointly in a trust, and the powers thereby conferred will have accordingly to be exercised by them jointly.

"Official Trustee of Charitable Funds."—As to the Official Trustee see 18 & 19 Vict. c. 124, Sections 15 and 18, and 50 & 51 Vict. c. 49, Section 4.

Statute of Limitations may be pleaded by trustees.

8. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained

by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the Statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this Section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this Section had been pleaded.

(3) This Section shall apply only to actions or other proceedings commenced after the First day of January, One thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

Section 8.—This Section effected a most important and much-needed alteration in the law. The effect is that, except in the three cases of fraud by a trustee, retention of trust property by him, or receipt by him and conversion of it to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitations as if actions or proceedings for breaches of trust were enumerated in them (How *v.* Earl Winterton [1896], 2 Ch. 626). Even if the breach of trust is not barred by lapse of time under this Section, yet if the trustee has acted "honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach," the Court may now, under Section 3 of The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), relieve him, either wholly or partly, from personal liability (see notes to Section 3, *infra*). Previous to the passing of The Trustee Act, 1888 (apart from The Bankruptcy Act, 1883, referred to hereafter) the state of the law as to how far the Statutes of Limitations applied to actions for breaches of trust seems to have been as follows:—

1. *As to Express Trusts.*—It is clear that they were not within the Statutes of Limitations. In Petre *v.* Petre (1 Drew. 393) the Vice-Chancellor of England said: "A person who is, under some instrument, an express trustee, or who derives title under such trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the Statute." In Obee *v.* Bishop (1 De G. F. & J. 137) Turner, L. J., said: "I am of opinion that it would be most dangerous to hold that a demand against the assets of a deceased trustee or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death." This has been followed in many subsequent cases, and the Statutes have been held not to apply, even after very long periods of time have elapsed (see Woodhouse *v.* Woodhouse, L. R., 8 Eq. 514; Butler *v.* Carter, L. R., 5 Eq. 276; and Edwards *v.* Warden, 1 App. Cas. 281). Any doubt on this point would be set at rest by Section 25, Sub-section 2, of The Judicature Act, 1873 (36 & 37 Vict. c. 66), which enacts that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

This may at first sight appear to be inconsistent with Section 10 of The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which enacts that "after the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." But this is explained by the fact that the latter Section quoted applies as between land charged and the persons entitled to a charge, while the former applies to claims as

between a *cestui que trust* and trustee (see Fearnside *v.* Flint, 22 Ch. D. 579; Hughes *v.* Coles, 27 Ch. D. 231).

But even in cases of express trust, where there has been gross laches in bringing the action, and there is evidence of acquiescence on the part of the plaintiff, the Court will not, after the lapse of a long period (in the case in question about twenty years), interfere on the plaintiff's behalf (Bright *v.* Legerton, 2 De G. F. & J. 606).

2. *As to Implied or Constructive Trusts.*—It seems that in cases where there has been laches on the part of the plaintiff in bringing the action, or acquiescence, the Court would not readily interfere, though no strict rule has been laid down as to the exact length of time required to justify the Court in refusing its assistance (see Kirkman *v.* Booth, 11 Beav. 273; Sleeman *v.* Wilson, L. R., 13 Eq. 36: in each of which cases a period of about forty years had elapsed before the action was brought).

In Townshend *v.* Townshend (1 Bro. C. C. 550) Lord Commissioner Ashurst says: "Then as to trusts being an exception to the Statute of Limitations, the rule holds only as between trustees and *cestui que trusts*. It is true that a trustee cannot set it up against his *cestui que trust*, but this is merely the case (referring to the case he was hearing) of *a trustee by implication*, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both Courts of Law and Equity preserve an analogy to the Statute of Limitations." Again, in Beckford and Others *v.* Wade (17 Ves. 87) the M. R. said: "It is certainly true that no time bars a direct trust as between a *cestui que trust* and trustee; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a Court of Equity to seek that relief."

The Statute would (by analogy) begin to run in these cases of constructive trust from the date of the discovery of the circumstances which constitute the right to relief.

Reference has been made above to The Bankruptcy Act, 1883, which, by permitting (Section 37, Sub-sections 1 and 3) liabilities for breaches of trust to be provable in bankruptcy, and by enacting (Section 30, Sub-section 2) that an order of discharge shall release the bankrupt from debts provable in bankruptcy other than (*inter alia*) debts or liabilities incurred by means of a fraudulent breach of trust, opened a method of escape, though not an inviting one, to trustees seeking to be relieved from long-standing liabilities arising from ordinary breaches of trust untainted by fraud.

Section 25, Sub-section 2, of The Judicature Act, 1873, cited above, is in effect repealed by the Section of this Act now under discussion (Section 8), so far as regards innocent breaches of trust untainted by fraud; but not in cases where the claim is to recover trust property still retained or previously received by the trustee and converted to his use.

As pointed out above in the note to Section 1 (*ante*, p. 2) the distinction drawn in equity between express and constructive trusts is no longer of importance in applying the Statutes of Limitations (see Soar *v.* Ashwell [1893], 2 Q. B. 393; and Warren *v.* Murray and Another [1894], 2 Q. B. 648).

Sub-section 1.—"Action" has probably a wider meaning than the technical one given it in The Judicature Act, 1873, Section 100, where it is defined as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and shall not include a criminal proceeding by the Crown." Whatever it may mean is considerably widened by the addition in Section 8, Sub-section 1, of this Act of the "or other proceeding," which would cover all civil and criminal proceedings.

The benefit of the Act is not personal to the trustee; it extends also to "*any person claiming through him.*"

The Section is intended to give trustees the benefit of the Statutes of Limitations, and it is clear from the decisions that the particular Statute of Limitations the protection of which will be chiefly invoked is 21 Jac. I. c. 16, which limits the period for bringing actions of debt to six years from the cause of action (see How *v.* Earl Winterton [1896], 2 Ch. 626).

The Act has in no way altered the principles which determine the time at which a cause of action for breach of trust or concealed fraud accrues (Thorne *v.* Heard [1894], 1 Ch. 599). Time begins to run from the date of the breach of trust, as by making a wrong investment, not the date of the loss accruing from it (*re* Bowden, Andrew *v.* Cooper, 45 Ch. D. 444; and *re* Somerset, Somerset *v.* Earl Poulett [1894], 1 Ch. 231).

This is consonant with the principles applied under 21 Jac. I. c. 16 to actions for negligence, in which cases, the Statute being pleaded, it has been held that it runs from the time when the breach of duty is committed, and not from the time when the negligence was discovered or the consequential damage accrued (Howell *v.* Young, 5 B. & C. 259; Smith *v.* Fox, 6 Hare 386).

In Sovereign Assurance Society *v.* Eardley Wilmot (37 Sol. J. 581) it was held that a winding up of a company does not revive or create any new liability as between the directors for acts done in the past and the liquidator, but that they are trustees *qud* the company, and that the Statute will run as between them and the company as their *cestui que trust* from the period when the act complained of was done.

As Section 8, Sub-section 1 (*b*), of this Act says that time is to be a bar, "in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received," it is obvious that the Statute will have the same effect in a case of trust as in the case of

an action for debt; hence, as it is clear that in the latter case the Statute does not extinguish the debt, but merely bars the remedy by action (Curwen *v.* Milburn, 42 Ch. D. 424), the rule will be the same in a case of breach of trust. It would seem, however, that the practical effect of this is not of any importance, except so far as there may be acknowledgment.

Certain cases are expressly excepted from the operation of the Section (see Section 8, Sub-section 1):—

1. Where the claim is founded on any fraud.
2. Where the claim is founded on fraudulent breach of trust to which the trustee was party or privy.
3. Where the claim is to recover trust property, or the proceeds thereof, still retained by the trustee.
4. Where the claim is to recover trust property, or the proceeds thereof, previously received by the trustee and converted to his use.

To these may be added the modification created by the last clause of Sub-section 1 (*b*): namely—

5. The Statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

Exception 1.—*Where the Claim is Founded on any Fraud.*—The Court, for obvious reasons, has always carefully refrained from defining fraud. Fraud on the part of a trustee of an express trust is a misdemeanour, and punishable under the Criminal Law (24 & 25 Vict. c. 96, Section 80; and see also Section 1 of that Act for the definition of "trustee").

Exception 2.—*Party or Privy.*—In Thorne *v.* Heard ([1894] 1 Ch. 599), Lindley, J., remarks that a person "who knows nothing of the fraudulent act of another, and in no way ratifies or benefits by it, and has no moral complicity with it," cannot be said to be *party or privy* to it.

Exception 3.—This exception would prevent the Statute of Limitations applying even now to such a case as Soar *v.* Ashwell ([1893] 2 Q. B. 393), which would be decided under the law as it now stands as it was decided in 1893. As to the meaning of the words "still retained" see Thorne *v.* Heard ([1894] 1 Ch. 599). This exception applies and is confined to cases in which *at the date of the writ* the trustee still retains—that is, has actually in his hands or under his control—the trust property, or the proceeds thereof, sought to be recovered (Wassell *v.* Leggatt [1896], 1 Ch. 554).

Exception 4.—See *in re* Gurney, Mason *v.* Mercer ([1893] 1 Ch. 590). The case of Wassell *v.* Leggatt ([1896] 1 Ch. 554) is a good example of the scope of this exception. There a woman, married in 1854, received in 1876 a legacy of £300 given her for her separate use, but was forcibly deprived of the money by her husband, who knew it was a legacy. During the husband's lifetime the wife frequently asked him for the money; but no proceedings to recover it were taken until

after his death, which occurred in 1894. Romer, J., held the husband was affected with notice of the separate use, and was a trustee for the wife, and that the Statute of Limitations did not apply.

Exception 5.—If there be a gift to A. for life, remainder to B. for life, remainder to children of A., and in default to A. in fee, it would seem that if the Statute were a bar to an action by A. while his life estate only was in possession, it would not necessarily bar an action after the fee in remainder had come into possession (see *re* Somerset, Somerset *v.* Earl Poulett [1894], 1 Ch. 231).

Sub-section 1 (*a*).—In *re* Bowden, Andrew *v.* Cooper (45 Ch. D. 444), which was an action against the executor of a deceased trustee in respect of investments negligently made, it was established that in cases of mere negligence Section 8 applied—Sub-section 1 (*b*) being the particular part which operated —and that none of the exceptions excluded the case from that operation.

Shortly, the case was as follows:—A newly appointed trustee of a Will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. It was held that Section 8, Sub-section 1 (*b*), applied. In this case a curious point was raised with reference to Section 8, Sub-section 1 (*a*), of the Act. It was said that that Sub-section could not apply, for the action was one which could not be brought against anyone not a trustee; and Fry, J., in reference to this argument, said: "That was the Sub-section relied on by the defendant; but I do not think that it can apply in this case. In the first place, it is obvious that if a person had not been a trustee he could not be sued for a breach of trust, and further, that there is no right or privilege, that I am aware of, conferred by any Statute of Limitations in respect of a breach of trust." If this view is correct, Sub-section 1 (*a*) might as well have been left out of the Act.

Probably it was put in *ex majore cautelâ*, but it was certainly not intended to be merely nugatory. This comment of Fry, J., is, it is submitted, a refinement in construing the Statute which might tend to destroy a useful legislative enactment. The Sub-section in question evidently means that, assuming an action is brought against a trustee in that capacity, then he is to have the same protection from the Statute of Limitations (except in the cases excluded) as if he had not been a trustee. Thus, in an action for breach of trust by negligent investment (or, to put it shortly, an action for negligence) he can plead the Statute relating to limitation of actions for negligence, as any other subject of the Queen might who is not a trustee, and this view has been adopted in the case, cited above, of How *v.* Earl Winterton ([1896] 2 Ch. 626).

If, however, the view of Fry, J., is correct, it seems clear that this particular Sub-section does not apply to an action against a trustee for breach of trust.

In *re* Page, Jones *v.* Morgan ([1893] 1 Ch. 304), a trustee was sued for breach of trust by having expended the whole of a sum payable to the plaintiff on attaining majority in educating and maintaining him during minority. Twelve years after coming of age the action was brought. The plaintiff did

not allege that the defendant had been party or privy to any fraud or fraudulent breach of trust, and there was no evidence that he had converted any part of the fund to his own use, or that he had retained any part of it; but he admitted he had never rendered any account to the plaintiff. Justice North held that Section 8 of the Trustee Act applied, and dismissed the summons, but without costs.

Sub-section 1 (*b*).—By enacting that where no existing Statute of Limitations applies "the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received," the Act seems to mean, according to the cases which have been decided, that in all cases in future where a breach of trust has been committed without the elements of fraud or conversion of trust property, six years shall be the period after which the remedy is barred, and this is strictly in accordance with the words of the Section, which make lapse of time a bar as if the claim had been made against the trustee "*in an action of debt for money had and received.*"

In re Somerset, Somerset *v.* Earl Poulett ([1894] 1 Ch. 231), clearly lays down that the effect of Section 8 is that any action or proceeding to recover money or other property from trustees (being one to which no Statute of Limitations existing at the passing of the Act applies) is to be brought within six years from the time when the right of recovery accrued. In that case, in August, 1878, the trustees of a settlement committed an innocent breach of trust by investing trust money upon mortgage of property of insufficient value. The mortgagor paid the interest on the money advanced direct to the tenant for life until 1890. In 1892 the tenant for life and the infant remainderman brought an action against the trustees to compel them to make good the amount of the investment. It was held that the right of action of the *tenant for life* against the trustees was barred after six years from the time when the investment was made, and that although the payment of interest by the mortgagor direct to the tenant for life amounted in law to a payment by him to the trustees, and by them to the tenant for life, it was not an admission or acknowledgment which would take the case out of the Statute.

This case is also an authority which shows that the Statute will not run against an infant beneficiary until he attains his majority.

In re Tucker, Tucker *v.* Tucker ([1894] 1 Ch. 724; see S. C. [1894] 3 Ch. 429), is a case showing that a partner in a firm may constructively become a trustee of moneys lent to the firm, and that payment of interest on the loan by the continuing partners may take the case out of the Statute, and so leave him liable to make good the breach committed by leaving the money with the firm after a change had taken place in its constitution. W. T., a member of a firm, was jointly and severally liable in a sum of money deposited with the firm by the trustees of a Will. In 1883 W. T. retired from the firm, and a deed of dissolution was

executed by which it was agreed that W. T.'s retirement should not be made known for a year, and that it should be then optional whether it should be gazetted; that the continuing partners should take and collect all the assets, and pay all the debts and liabilities, and should indemnify W. T. against them, and should pay him a certain sum by instalments; and that so long as any money remained due to him he should have power, on giving notice, to collect the debts due to the firm, and to re-enter on the premises and carry on the business himself. W. T.'s retirement was never gazetted, and the business was carried on in the old name of the firm. Down to 1891 interest on the loan was regularly paid to the testator's estate by cheques drawn in the name of the firm. The Court of Appeal held, as against W. T., that the debt was not barred by the Statute of Limitations, notwithstanding Section 14 of the Mercantile Law Amendment Act, for that, considering the terms of the deed of dissolution and the fact that the retirement of W. T. was kept secret, the payment of interest after his retirement by the continuing partners must be taken to have been made by them on his behalf and as his agents.

The Statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession. In Mara *v.* Browne ([1895] 2 Ch. 69) it was held that a life estate by implication was given to a married woman, which came into effect on the death of her husband. He died in 1885. In 1890 she brought an action complaining of a breach of trust, and it was held that, even though the action might have been barred in respect of a joint interest which she had with her husband, it was not barred in respect of the implied life estate, which came into possession in 1885.

The true construction of this Sub-section is to put all breaches of trust, whether creating a simple contract liability or one of the nature of a debt due by specialty, on the same footing, and to make the period of six years apply to both kinds of liability to such actions. In the words of the Section, "no existing Statute of Limitations applies," and these breaches of trust would *primâ facie* appear to come within this Sub-section.

As has been observed, Sub-section 1 (*b*) is, pending a decision on Sub-section 1 (*a*), the effective enactment in this Section. With reference to its operation, the case of Moore *v.* Knight ([1891] 1 Ch. 547) shows that the principle established by the case of Blair *v.* Bromley (2 Ph. 354; 5 Hare 542) is not affected in any way by the Section in question. The case, shortly, was as follows:—Between the years 1867 and 1874 the plaintiff deposited divers sums of money with Messrs. M. G. & B., a firm of solicitors, for the purpose of investment. Representations were from time to time made to the plaintiff, on behalf of the firm, that her money had been duly invested, and interest was paid to her by Messrs. M. G. & B. down to the death of G. in 1877, and by the surviving members of the firm down to 1886. In 1886 it was discovered that the plaintiff's money had never, except as to one small sum, been invested, but had, in fact, been embezzled by a clerk of the firm. An action was brought by the plaintiff after the death of all the partners for the recovery of her money, and G.'s executors pleaded the Statute of Limitations

and The Trustee Act, 1888, and contended that this Act had rendered the decision in Blair *v.* Bromley no longer applicable; but it was held that the plaintiff could recover.

In Thorne *v.* Heard ([1894] 1 Ch. 599) Blair *v.* Bromley was distinguished, and the Statute held to apply. In this case, the defendants, the first mortgagees of property, in 1878 sold under their power of sale, and employed S., a solicitor, to conduct the sale for them. S. received the sale moneys, and, after satisfying the defendants' mortgage debt, retained the surplus sale moneys, falsely representing to the defendants that he, S., had the authority of the plaintiff, the second mortgagee, to receive the same. S. applied the surplus to his own use, and until March, 1891, concealed his fraud by continuing to pay the plaintiff interest on the second mortgage as though it were still existing. In February, 1892, S. became bankrupt, when the true facts were discovered; whereupon the plaintiff brought an action against the defendants for an account of the sale moneys, and payment of what was due to him on his second mortgage. It was held that the plaintiff's claim was barred by the Statute of Limitations and the Trustee Act, on the ground that his cause of action first accrued in 1878, when the defendants committed an innocent breach of trust in allowing S. to receive the surplus sale moneys instead of handing them over to the plaintiff, and not in 1892, when the plaintiff discovered S.'s fraud; and that the defendants were not liable under the exception in Section 8 either as having been "party or privy" to the fraud of S., or as having "still retained" the money sought to be recovered, the money not having been actually in their hands or under their control at the commencement of the action. Stirling, J. (p. 555), says: "It appears, therefore, that the money came into the hands of the firm of Messrs. Bromley without fraud, and that one of the firm afterwards committed a fraud in respect of it, but made misrepresentations (some of which were attributable to the firm), which prevented the fraud from being discovered until the period fixed by the Statute of Limitations had expired. It was held that the innocent partner was deprived of the benefit of the Statute by those representations, which bound him as a partner. The decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts; and in my opinion those principles are unaffected by the provisions of The Trustee Act, 1888."

In re Swain, Swain *v.* Bridgman ([1891] 3 Ch. 233), was another case on Sub-section 1 (*b*). In that case, instead of realising the testator's residuary personal estate, the trustees, at the instance of the widow, in breach of trust allowed her and her children to live at the farm which the testator had occupied, and the trustees and the survivors of them carried on the farm, by the profits of which the widow and children were maintained, and the children were educated. The action was to render the surviving trustee liable to make good to the testator's estate an alleged loss of £1822 3s. 3d. by the delay in realising his residuary personal estate, and by employing his assets in the farming business. It was held that Section 8 applied.

In Robinson *v.* Harkin ([1896] 2 Ch. 415) it was laid down that the principle established in Wolmershausen *v.* Gullick ([1893] 2 Ch. 514) that

the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as between the co-trustees until the claim of the *cestui que trust* has been established against one of them.

Reference may also be made to the cases cited above: *in re* Bowden, Andrew *v.* Cooper (45 Ch. D. 451), and *in re* Page, Jones *v.* Morgan ([1893] 1 Ch. 304).

Time is by this Act, in cases coming within Section 8, Sub-section (*b*) —*i.e.* where the statutory period which bars an action for debt for money had and received is applicable—to run even against a married woman, whether restrained from anticipation or not, provided she is entitled in possession. This is a deviation from 21 Jac. I. c. 16, Section 7, which treats coverture as a disability.

Sub-section 2.—In effect this Sub-section allows the Statute to be pleaded as against one or more beneficiaries, though the trustees may remain liable to another or other beneficiaries for recouping to them their own share of the trust fund.

Sub-section 3.—This Section 8 is only applicable to actions or other proceedings commenced after the 1st of January, 1890, though the trust may itself have been created before that date, and preserves all existing defences under any Statute of Limitations.

In *re* Harrison, Allen *v.* Cort (W. N. [1892] 148), it was decided that this Section had no application as against persons who had been served with a decree for general administration pronounced after the 1st of January, 1890, in an action which had been commenced before that date.

Order 19, Rule 15, of the Rules of the Supreme Court deals with the rules of pleading as relate to pleading the Statute of Limitations. The Statute, when it is to be relied on, should be specifically pleaded (Clarke *v.* Callow, 46 L. J., Q. B. 53; Olley *v.* Fisher, 34 Ch. D. 367); but it is not necessary to plead the particular Section. If it be sought to exclude the operation of the Statute on the ground of concealed fraud, the utmost particularity is required.

Put shortly, the law as it now stands under this Act is as follows:—

1. The Statute of Limitations runs in favour of a trustee who has committed an innocent breach of trust.
2. It is immaterial whether the breach be known to the beneficiary or not, but the beneficiary's interest must be one in possession for the Statute to run against him or her.
3. The Statute is not prevented from running by payment of interest.
4. Fraud or fraudulent breach of trust to take the case out of the Statute must be such that the trustee was party or privy to it.

5. Fraud by an agent of a trustee will not prevent the Statute from running, if the trustee be not party or privy to it.

6. "Trust property" still retained means property physically in the trustee's possession or under his control.

It may be useful to give here the provisions of certain other Acts relating to the limitation of proceedings dealing with trusts, which provisions, being untouched and unrepealed by this Act or by The Trustee Act, 1893, have considerable bearing on the Section of the Act of 1888 now under discussion.

By 3 & 4 Will. IV. c. 27, Section 25, it is enacted: "Where any land or rent within the meaning of any Statute of Limitations is vested in a trustee on any express trust, the right of the beneficiary, or any person claiming through him, to bring an action against the trustee, or any person claiming through him, to recover the land or rent, shall be deemed to have first accrued, according to the meaning of any Statute of Limitations, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against that purchaser and any person claiming through him."

By 36 & 37 Vict. c. 66, Section 25, Sub-section 2, and 40 & 41 Vict. c. 57, Section 28, Sub-section 2, it is enacted that "no claim of a beneficiary against his trustee in respect of any property held on an express trust or in respect of any breach of an express trust shall be barred by any Statute of Limitations." This has been commented on above.

37 & 38 Vict. c. 57, Section 10, enacts that "no action or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trusts."

With regard to 3 & 4 Will. IV. c. 27, Section 25, it is to be observed that the Section applies to any "*land*" or "*rent*" vested on "*any express trust*," and runs only in favour of a purchaser for valuable consideration, or any person claiming under him. The Section is not for the protection of a trustee who may have been in possession of the property, but of a purchaser from him. As from that purchaser the property can only be recovered within such period as the law may lay down, calculating from the period of accruer of the right to bring the action. The Section, in addition to enacting who may benefit by the limitation of time, defines when the right to bring the action which is to be barred shall be deemed to have accrued.

It would therefore appear that, as between the trustee and *cestui que trust*, nothing in the present Act affects the operation of this Section (Section 25 of 3 & 4 Will. IV. c. 27), for that Section operates only upon a conveyance for valuable conveyance. Up to that instant of time the property would be "still retained by the trustee" within the exception in Section 8, Sub-section 1, of The Trustee Act, 1888, and so the Statute would not run against the *cestui*

que trust. It is also clear that Section 25 of 3 & 4 Will. IV. c. 27 would not bar a claim against a volunteer claiming under the trustee (Sturgis *v.* Morse, 24 Beav. 541). A lease is treated as being a conveyance for value (Attorney-General *v.* Davey, 4 De G. & J. 136; Attorney-General *v.* Payne, 27 Beav. 168).

It is clear from the cases decided on this Section that "express trust" means one expressly declared by some deed, will, or other document, and does not include what are known as "constructive trusts" (Petre *v.* Petre, 1 Drew. 393).

Constructive trusts cannot be set up after a great lapse of time, Courts of Equity by analogy applying the Statute of Limitations, and the trustee will be entitled to retain the property (Beckford and Others *v.* Wade, 17 Ves. 87; *ex parte* Hassell, 3 Y. & Coll. 622; Bell *v.* Bell, 1 Lloyd & G., *temp.* Plunkett, 65; Bonny *v.* Ridgard, 4 Bro. C. C. 138).

In Salter *v.* Cavanagh (1 Dr. & Wal. 668) a trust arose on the face of the instrument, and so was within this Section.

As to who are express trustees within the meaning of the Section the following cases may be consulted:—

A trustee *de son tort*, where there were express trusts (Life Association of Scotland *v.* Siddall, 3 De G. F. & J. 58), was held a trustee within this Section.

A trust for sale of land by way of security for money is not an express trust (Locking *v.* Parker, L. R., 8 Ch. 30).

So, too, an assignee in bankruptcy who has taken a conveyance of the legal estate upon trust for creditors is a trustee within the Section (Sturgis *v.* Morse, 3 De G. & J. 1, on appeal from S. C. 24 Beav. 541).

In Dawkins *v.* Penrhyn (4 App. Cas. 51) a devise to a person and his heirs male "in fullest trust and confidence" that he would not do, nor permit to be done, "any act in law or otherwise" to defeat the declared trusts, was held not to create a trust.

In *re* Alison, Johnson *v.* Mounsey (11 Ch. D. 284), Locking *v.* Parker was explained, and it was decided that a mortgage containing a trust for sale could not be executed after twenty years' possession by the mortgagee in whose favour the Statute would then have run.

In Patrick *v.* Simpson (24 Q. B. D. 128) it was held there was an express trust for an heir at law.

In re Bell, Lake *v.* Bell (34 Ch. D. 462), was a case of a sale by a mortgagee, the moneys being retained by the solicitor who acted, who was held a trustee.

In Dickinson *v.* Teasdale (1 De G. J. & S. 59) the class of trust to which this Section refers is clearly pointed out.

Although the trust must be an express one, the actual word need not be used (Commissioners of Charitable Donations *v.* Wybrants, 2 Jon. & Lat. 197). But so long as the words used naturally give rise to a trust, that is an "express trust" within the Section.

The most useful case on this point is Patrick *v.* Simpson (24 Q. B. D. 128),

following exactly Salter *v.* Cavanagh (1 Dr. & Wal. 668), and is distinguishable from Churcher *v.* Martin (42 Ch. D. 312) on the ground that the deed in that case, which conveyed the land to the trustees, was void under the Mortmain Act. In Mutlow *v.* Bigg (L. R., 18 Eq. 246), where there was a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, and the trustees allowed part of the land to remain unsold for fifty years, it was held that the trust was an express one within the Section in the former Act similar to this one, and a decree for the execution of the trust of the unsold land was made at the suit of a residuary legatee. This case was reversed upon further evidence in the Court above, but the point decided is not affected.

Putting the matter shortly, it will appear that what is an "express trust" is a question to be decided with reference to this particular Statute, and is not to be determined by reference to the general distinctions drawn in Courts of Equity between trusts, as express, implied, constructive, or otherwise.

With reference to the point whether time runs as against persons under disability, the result of the cases appears to be that time begins to run from the date of the estate falling into possession, or the disability coming to an end (Thompson *v.* Simpson, 1 Dr. & War. 489; Attorney-General *v.* Magdalen College, 18 Beav. 239; Life Association of Scotland *v.* Siddall, 3 De G. F. & J. 58; Shaw *v.* Keighron, 3 Ir. R. Eq. 574; Butler *v.* Carter, L. R., 5 Eq. 276; Quinton *v.* Firth, 2 Ir. R. Eq. 396).

Time, under Section 25 of 3 & 4 Will. IV. c. 27, actually begins to run as against a *cestui que trust* from the moment when a conveyance to a *bonâ fide* purchaser for value has taken place (Petre *v.* Petre, 1 Drew. 371).

With regard to Section 25, Sub-section 2, of 36 & 37 Vict. c. 66, as remarked, it appears to be in direct conflict with the provisions of Section 8 of The Trustee Act, 1888, which would no doubt prevail as a later enactment. Indeed, in none of the cases decided on that Act since it was passed has it been contended that Section 25 of 36 & 37 Vict. c. 66 still continues to govern cases.

As to Section 10 of 37 & 38 Vict. c. 57, set out above, it is clear a charge would not, in the absence of this Section, have been a trust within 36 & 37 Vict. c. 66, Section 25, Sub-section 2, as Section 40 of 3 & 4 Will. IV. c. 27 specially dealt with such charges, and under it twenty years was the period of limitation; but Section 10 of 37 & 38 Vict. c. 57 places charges, whether secured by a trust or not, on the same footing, and they are thus barred at the end of twelve years.

But cases may occur where, though in form a charge, there is really a trust, as in the cases of Commissioners of Charitable Donations *v.* Wybrants (2 Jon. & Lat. 182) and Hunt *v.* Bateman (10 Ir. Eq. R. 360). These cases would now, it is apprehended, fall under Section 8 of The Trustee Act, 1888.

THE TRUST INVESTMENT ACT, 1889.

(52 & 53 VICT., CHAPTER 32.)

An Act to Amend the Law relating to the Investment of Trust Funds. [12th August, 1889.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as The Trust Investment Act, 1889.

Investment of sinking fund by local authorities.

7. Where the council of any county or borough or any urban or rural sanitary authority are authorised or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares, or securities in which trustees are authorised by this Act to invest, except that such council or authority shall not by virtue of this Section invest in any stocks, funds, shares, or securities issued or created by themselves, nor in real or heritable securities.

Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate, and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.

The whole of The Trust Investment Act, 1889, *with the exception of Sections* 1 *and* 7, *given above, is repealed by The Trustee Act*, 1893 (*see Section* 51 *and Schedule*). *With regard to these unrepealed Sections see the notes to Section* 1 *of The Trustee Act*, 1893 (*infra*, p. 31)

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PART III.

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New Trustees and Vesting Orders.

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Payment into Court by Trustees.

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ARRANGEMENT OF SECTIONS

OF

THE TRUSTEE ACT, 1893.

(56 & 57 Vict., Chapter 53.)

PART I.

Investments.

Section

1. Authorised investments.
2. Purchase at a premium of redeemable stocks.
3. Discretion of trustees.
4. Application of preceding Sections.
5. Enlargement of express powers of investment.
6. Power to invest, notwithstanding drainage charges.
7. Trustees not to convert inscribed stock into certificates to bearer.
8. Loans and investments by trustees not chargeable as breaches of trust.
9. Liability for loss by reason of improper investments.

PART II.

Various Powers and Duties of Trustees.

Appointment of New Trustees.

10. Power of appointing new trustees.
11. Retirement of trustee.
12. Vesting of trust property in new or continuing trustees.

Purchase and Sale.

13. Power of trustee for sale to sell by auction, &c.
14. Power to sell subject to depreciatory conditions.
15. Power to sell under 37 & 38 Vict. c. 78.
16. Married woman as bare trustee may convey.

Various Powers and Liabilities.

Section
17. Power to authorise receipt of money by banker or solicitor.
18. Power to insure building.
19. Power of trustees of renewable leaseholds to renew and raise money for the purpose.
20. Power of trustee to give receipts.
21. Power for executors and trustees to compound, &c.
22. Powers of two or more trustees.
23. Exoneration of trustees in respect of certain powers of attorney.
24. Implied indemnity of trustees.

PART III.

Powers of the Court.

Appointment of New Trustees and Vesting Orders.

25. Power of the Court to appoint new trustees.
26. Vesting orders as to land.
27. Orders as to contingent rights of unborn persons.
28. Vesting order in place of conveyance by infant mortgagee.
29. Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.
30. Vesting order consequential on judgment for sale or mortgage of land.
31. Vesting order consequential on judgment for specific performance, &c.
32. Effect of vesting order.
33. Power to appoint person to convey.
34. Effect of vesting order as to copyhold.
35. Vesting orders as to stock and choses in action.
36. Persons entitled to apply for orders.
37. Powers of new trustee appointed by Court.
38. Power to charge costs on trust estate.
39. Trustees of charities.
40. Orders made upon certain allegations to be conclusive evidence.
41. Application of vesting order to land out of England.

Payment into Court by Trustees.

42. Payment into Court by trustees.

Miscellaneous.

Section
43. Power to give judgment in absence of a trustee.
44. Power to sanction sale of land or minerals separately.
45. Power to make beneficiary indemnify for breach of trust.
46. Jurisdiction of Palatine and County Courts.

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

47. Application to trustees under Settled Land Acts of provisions as to appointment of trustees.
48. Trust estates not affected by trustee becoming a convict
49. Indemnity.
50. Definitions.
51. Repeal.
52. Extent of Act.
53. Short title.
54. Commencement.

SCHEDULE.

THE TRUSTEE ACT, 1893.

(56 & 57 VICT., CHAPTER 53.)

An Act to Consolidate Enactments relating to Trustees.

[22nd September, 1893.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

INVESTMENTS.

Authorised investments.

1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following: that is to say—

(*a*) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom:

(*b*) On real or heritable securities in Great Britain or Ireland:

(*c*) In the stock of the Bank of England or the Bank of Ireland:

(*d*) In India Three-and-a-half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament:

(*f*) In consolidated stock created by the Metropolitan Board of Works or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(*g*) In the debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock:

(*h*) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in Sub-section (*g*), either alone or jointly with any other railway company:

(*i*) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j*) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C, of the East Indian Railway Company:

(*k*) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(*l*) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(*m*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(*o*) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court,

and may also from time to time vary any such investment.

Section 1.—This Section substantially replaces Section 3 of The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), the whole of which Act, with the exception of Sections 1 and 7, is repealed by the present Act (see Section 51 and the Schedule).

This Section applies as well to trusts created before as to trusts created after the passing of the Act, and the powers thereby conferred are in addition to the powers conferred by the instrument (if any) creating the trust (see Section 4, *infra*, p. 33).

The case of there being no instrument creating the trust is expressly contemplated by this Section, and it is conceived that the word "trustee" includes not only an express trustee, but also a person having in his hands moneys which by the rules of equity are impressed with a trust, and which by those rules he is bound to invest (see *in re* National Permanent Mutual Benefit Building Society, 43 Ch. D. 431; *in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney-General, 43 Ch. D. 420; and the definition of the expression "trustee" in Section 50 of the present Act).

"Trustee" applies not only to a sole trustee, but also to the case of several trustees.—See The Interpretation Act, 1889 (52 & 53 Vict. c. 63), Section 1, Sub-section 1 (*b*).

"Unless expressly forbidden by the instrument (if any) creating the trust."—The effect of these words is, where the trust was created before the passing of the Act, and the trust instrument expressly forbids investment in any particular security specified in this Section, or expressly forbids investment in other than certain named securities, to debar the trustees from investing, in the one case in the excluded security, and in the other in any securities other than those indicated in the trust instrument; and where the trust is created after the passing of the Act, to enable the creator of the trust to exclude the operation of this Section, and to preclude the trustees from investing the trust fund in securities other than those pointed out by the trust instrument.

In a case where a testator gave to his trustees all the property that he was then possessed of or might thereafter possess, the same to be sold or realised (except his Great Eastern Railway Stock, which it was his will should not be altered or sold), and the proceeds thereof invested in specified securities, it was held by Mr. Justice North that, notwithstanding that certain securities were specifically indicated by the testator, the trustees might invest the proceeds of conversion in any of the investments authorised by this Section, since there was no express prohibition against such investment contained in the Will, and Section 4 of this Act expressly provided that the power conferred by this Section should be in addition to the power conferred by the instrument, if any, creating the trust (*re* Wm. Norris deceased, Lambert *v.* Norris, heard before the Judge in Chambers on the 29th of June, 1896).

Similar words were inserted in The Trust Investment Act, 1889, but no such proviso was contained in Section 11 of Lord St. Leonard's Act (23 & 24 Vict. c. 38), which was repealed by the last-mentioned Act, and enabled trustees having power to invest upon Government securities or upon Parliamentary stocks, funds, or securities to invest upon any of the stocks, funds, or securities

in or upon which, by general order, cash under the control of the Court might from time to time be invested.

It may be useful to bear in mind that Section 27 of The National Debt (Conversion) Act, 1888 (51 Vict. c. 2), provided that when any stock converted or exchanged by virtue of that Act into new stock was held by a trustee, such trustee should be at liberty to sell the same, and to invest the proceeds arising from such sale in any of the securities for the time being authorised for the investment of cash under the control of the High Court, notwithstanding anything to the contrary contained in the instrument creating the trust.

The word "instrument" in this Act includes Act of Parliament (see Section 50).

"Invest."—Where a testator has directed a fund to be set apart and appropriated by the trustees of his Will for some particular purpose—as, for instance, to provide for an annuity—the power of investment given by this Act does not apparently authorise them at their discretion to invest in any of the investments mentioned in this Section; but the appropriation must be made by investing the necessary sum in the investments specifically pointed out by the Will, or, if the Will is silent as to the mode of investment, in New Consols, treating the interest at two and a half per cent. (*in re* Owthwaite, Owthwaite *v.* Taylor [1891], 3 Ch. 494).

A power enabling trustees to invest in "such stocks, funds, and securities as they should think fit" must be read as meaning "honestly think fit" (*re* Smith, Smith *v.* Thompson [1896], 1 Ch. 71).

"Trust Funds."—It was held by Mr. Justice North, in the case of *in re* National Permanent Mutual Benefit Building Society (43 Ch. D. 431), that the funds of a benefit building society invested in the name of the society, or in the names of trustees who have no power of investment independently of the Act, are not trust funds within this Section.

However, it has since been enacted by Section 17 of The Building Societies Act, 1894 (57 & 58 Vict. c. 47), which came into operation on the 1st of January, 1895, that "the powers of investment under Section 25 of The Building Societies Act, 1874, shall include power to invest in or upon any security upon which trustees are for the time being authorised by law to invest."

It is apprehended that whenever a fund is standing in the name of a trustee who has a power of investment over it, either by the terms of the trust instrument or by law, such a fund, even though held for charitable purposes, is a trust fund within this Section, and so far as there is no prohibition in the trust instrument the power conferred by this Section is applicable (*in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney-General, 43 Ch. D. 420).

"Whether at the time in a state of investment or not."—These words were not contained in The Trust Investment Act, 1889 (52 & 53 Vict. c. 32), and they are no doubt inserted in this Act for the purpose of obviating the question which was raised in the case of *in re* Dick, Lopes *v.* Hume-Dick ([1891] 1 Ch. 423; affirmed in the House of Lords as Hume *v.* Lopes [1892], App. Cas. 112).

Sub-section (*a*).—"Parliamentary Stocks."—It was said by Vice-Chancellor Sir W. Page Wood that in order to come within the description "Government or Parliamentary stocks or public funds," a fund ought to be either managed by Parliament, or paid out of the revenues of the British Government, or at least guaranteed by that Government (Brown *v.* Brown, 4 K. & J. 704, 706).

"Public Funds."—These words in strictness mean the funds provided by various Acts of Parliament for the payment of the annuities granted by the Government and forming part of the National Debt, and include only Government Annuities (Slingsby *v.* Grainger, 7 H. L. C. 273, 285).

"Government Securities."—This expression includes Bank Annuities (*ex parte* A Projected Undertaking &c., 11 Jur. 160), and it probably extends to Exchequer Bills, though the question is not free from doubt, since it has been decided differently in two cases (see *ex parte* Chaplin, 3 Y. & C., Exch. 397, and *ex parte* South Western Railway Co., 9 Jur. 650).

For a list of Government Securities see Appendix III., Part 1.

Sub-section (*b*).—This Sub-section does not enable trustees to invest in the purchase of real estate, but only on mortgage of it.

"Real or Heritable Securities."—Without reference to statutory enactment, a power to invest on real securities only authorises a mortgage of fee simple or copyhold lands in England or Wales.

By Section 9 of The Trustee Act, 1888 (51 & 52 Vict. c. 59), trustees having power to invest in real securities were authorised, and were to be deemed always to have had authority, to invest upon mortgage of leasehold property held for an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry, except for nonpayment of rent. That Section, however, is, for the purpose of consolidation, repealed by the present Act, and replaced by Section 5 thereof. As to how far Section 5 affects the general power of investing on real securities given by this Sub-section see Section 5 and the notes thereto, *infra*, p. 33 *et seq.*

Trustees advancing trust money on the security of copyholds ought not to rely upon a mere covenant to surrender, but should see that a surrender is actually made (see Wyatt *v.* Sharratt, 3 Beav. 498)

As to how far trustees are justified in making advances on the security of undivided shares or of reversions see Lewin's "Law of Trusts," 9th edition, p. 363.

With regard to the making of advances on the security of undivided shares, it must be borne in mind that such a mode of investment involves a complication with the rights of others which may ultimately lead to litigation and a reduction in the value of the security.

In the absence of an express authority, it is a breach of trust for trustees having the ordinary power to invest on "real securities" to invest on a contributory mortgage (see Webb *v.* Jonas, 39 Ch. D. 660, and Field *v.* Field [1894], 1 Ch. 425, 429).

Trustees are not justified in advancing trust money upon a second mortgage (Norris *v.* Wright, 14 Beav. 308, and Drosier *v.* Brereton, 15 Beav. 226), or upon a deposit of title deeds (Swaffield *v.* Nelson, W. N. [1876] 255); but they would probably be justified in making a loan upon the security of a sub-mortgage if they got the legal estate and stood in the shoes of the original mortgagee with regard to the power contained in or arising under the original mortgage deed (see Smethurst *v.* Hastings, 30 Ch. D. 490).

"Heritable."—This word seems to be introduced with reference to real property in Scotland. Heritable property in Scotland does not, however, in all respects correspond with what is known as real property in England: for instance, by Scotch law leases, even for a fixed term, are heritable unless the destination expressly excludes heirs (see Paterson's "Compendium of English and Scotch Law," Section 715).

This Act is not to extend to Scotland: that is to say, it is not to affect Scotch trustees or the Scotch law of trusts (see Section 52). It is conceived, however, that English or Irish trustees would, since the Sub-section now under consideration extends to "real or heritable securities in Great Britain or Ireland," be justified in making advances upon the security of property in Scotland which was essentially of a real character; but it is very doubtful whether they should be advised to do so, having regard to the great difference in Scotland in the law of real property and the practice of conveyancing.

"Ireland."—Trustees having power to advance trust money on lands in Ireland might invest it upon mortgage of leaseholds perpetually renewable with a head-rent, because that is a common tenure of land in Ireland (see Macleod *v.* Annesley, 16 Beav. 600), or upon lands held upon fee farm grants made under the provisions of 12 & 13 Vict. c. 105, and 31 & 32 Vict. c. 62, the effect of such grants being to convert the renewable leasehold tenure into a tenure in fee simple.

The law requires of a trustee investing the moneys of his trust upon mortgage security the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs (Learoyd *v.* Whiteley, 12 App. Cas. 727, 733, and Rae *v.* Meek, 14 App. Cas. 558, 569, 570).

Sub-section (*c*).—Bank Stock, however, was not at one time considered as a proper security for investment of trust moneys (Trafford *v.* Boehm, 3 Atk. 440, 444).

The Bank of Ireland was established by Royal Charter in 1783, and holds in Ireland a position analogous to that of the Bank of England, the Government accounts being kept there.

For particulars as to Bank Stock, see Appendix III., Part 2.

Sub-section (*d*).—For a list of India Stocks see Appendix III., Part 3.

Sub-section (*e*).—In the case of *in re* National Permanent Mutual Benefit Building Society (W. N. [1890] 117) North, J., said that he thought that interest

which was charged by Act of Parliament primarily upon a particular fund was not "guaranteed by authority of Parliament."

For a list of Stocks with Parliamentary guarantee see Appendix III., Part 4.

Sub-section (*f*).—For a list of and information concerning the Stocks included in this Sub-section see Appendix III., Part 5.

Sub-section (*g*).—See Sub-section (*o*) and the notes thereto. As to Railway Companies of the United Kingdom which fall under this Sub-section see Appendix III., Part 6.

Sub-section (*h*).—As to Stock which falls within this Sub-section see Appendix III., Part 7.

Trustees must exercise caution when investing under this Sub-section. The London Stock Exchange list of railways leased at fixed rentals is not altogether reliable, since some of the railways there mentioned have not been leased, but have been actually transferred to and vested in other railways. Prior to investment reference should be made to the lessor company or companies.

The expressions "leased in perpetuity" and "fixed rental" will probably need judicial interpretation.

Sub-section (*i*).—As to Indian Railways falling within this Sub-section see Appendix III., Part 8.

Sub-section (*j*).—It will be observed that this Sub-section, authorising, as it does, investments in deferred annuities comprised in the Register of Holders of Annuity Class D, and annuities comprised in the Register of Annuitants Class C, of the East Indian Railway Company, is more extensive than the Sub-section of The Trust Investment Act, 1889, which it replaces. As to these annuities see Appendix III., Part 9.

Sub-section (*k*).—This Sub-section is also somewhat wider in its terms than the Sub-section for which it is substituted; and see Appendix III., Part 10.

Sub-section (*l*).—For information as to Water Companies falling within this Sub-section see Appendix III., Part 11.

The words "company incorporated by Act of Parliament," do not include a company incorporated by registration under The Companies Act, 1862 (see *in re* Smith, Davidson *v.* Myrtle [1896], 2 Ch. 590).

Sub-section (*m*).—As to the effect of Sub-section 3 of Section 5 of this Act on the power of investment conferred by Sub-section (*m*) see Section 5 and the notes thereto, *infra*, p. 33 *et seq.*

For information as to the Stocks which fall within this Sub-section see Appendix III., Part 12.

Sub-section (*n*).—As to Stocks falling within this Sub-section see Appendix III., Part 13.

Sub-section (*o*).—The investment of cash under the control of or subject to the order of the Court is now regulated by Rule 17 of Order XXII. of the Rules of the Supreme Court.

The following are the investments authorised:—

Two-and-three-quarters per Cent. Consolidated Stock (to be called after the 5th April, 1903, Two-and-a-half per Cent. Consolidated Stock).

Consolidated Three Pounds per Cent. Annuities.

Reduced Three Pounds per Cent. Annuities.

Two Pounds Fifteen Shillings per Cent. Annuities.

Two Pounds Ten Shillings per Cent. Annuities.

Local Loans Stock under The National Debt and Local Loans Act, 1887.

Exchequer Bills.

Bank Stock.

India Three-and-a-half per Cent. Stock.

India Three per Cent. Stock.

Indian Guaranteed Railway Stocks or Shares: provided in each case that such Stocks or Shares shall not be liable to be redeemed within a period of fifteen years from the date of investment.

Stocks of Colonial Governments guaranteed by the Imperial Government.

Mortgage of freehold and copyhold estates respectively in England and Wales.

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.

Three per Cent. Metropolitan Consolidated Stock.

Debenture, Preference, Guaranteed, or Rentcharge Stocks of Railways in Great Britain or Ireland, having for ten years next before the date of investment paid a Dividend on Ordinary Stock or Shares.

Nominal Debentures or Nominal Debenture Stock under The Local Loans Act, 1875: provided that in each case such Debentures or Stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

It will be seen that the investments authorised by the Order of Court are almost all included amongst the investments directly authorised by this Act. The following differences, however, between the provisions of the Act and the directions contained in the Order of Court will be noticed: (1) The Act requires that in order to qualify the debenture, or rentcharge, or guaranteed, or preference stock of a railway in Great Britain or Ireland as a fit investment for trust funds, the railway company should, during each of the ten years last past before the date of investment, have paid a dividend of not less than three per cent. per annum on its ordinary stock, but the Order of Court only requires a dividend to have been paid for ten years next before the date of investment, and is silent as to amount. (2) The Order of Court extends to Indian Guaranteed Railway stocks or shares, provided that in each case such stocks or shares shall not be liable to be redeemed within fifteen years from the date of investment, whilst Sub-section (*i*) of this Section only includes debenture

stock the interest on which is paid or guaranteed by the Secretary of State in Council of India. (3) The Order of Court extends to nominal debentures and nominal debenture stock issued under The Local Loans Act, 1875, but the Act only extends to nominal or inscribed stock (see Sub-section [*m*]).

Questions will no doubt arise as to these differences between the powers given by the Sub-section above referred to and those given by reference to the Order of Court. It is submitted, however, that the powers given by the Act directly, and those given by reference to the Order of Court, are not inconsistent, but that it is the intention of the Act that the powers given by the Sub-sections should be permanent, and so have continuing effect in the event of the Order of Court, which is temporary in its nature, being altered or annulled.

Indian railway investments, to fall within the authority of the Act, whether under the provisions of Sub-section (*i*) or under the reference to the Order of Court, must not be liable to be redeemed within fifteen years of the date of purchase at par, or at some other fixed rate (see *infra*, Section 2, Sub-section 2).

If any question should arise with regard to the word "guaranteed," used in the Order of Court with reference to Indian Railways, the Courts would in all probability hold that it must be construed as having the same meaning as that attached to it in Sub-section (*i*) of this Section. It must be borne in mind also that the restriction as to price contained in Sub-section 2 of Section 2 of this Act applies to all investments in stock of the kind mentioned in Sub-section (*i*) made under the powers of this Act, whether given directly by that Sub-section, or by the reference in Sub-section (*o*) to the Order of Court.

After the passing of the Act it was suggested that trustees who might invest in securities authorised by this Section, but having a qualification attached to them—as, for instance, in railway stock under Sub-section (*g*)—would, in the event of the investment ceasing to be an investment in which a trustee would be authorised in investing under the powers of the Act, be liable for breach of trust in continuing to hold such securities. By Section 4, however, of The Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), it is provided that "a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law."

But the Section of the Amendment Act referred to has been held to have no retrospective operation, so as to exempt trustees from liability for a breach of trust committed before the passing of the Act in retaining an investment not authorised by the instrument of trust or by the general law (*in re* Chapman, Cocks *v.* Chapman [1896], 1 Ch. 323).

"*And may also from time to time vary any such investment.*" — This enables trustees to vary any investments made upon any such stocks, funds, or securities as are specified in this Section, without regard to the time at which the investment may have been made (Hume *v.* Lopes [1892], App. Cas. 112, which overrules *in re* Manchester Royal Infirmary, *infra*). The power, however, does not extend to any investment in stocks, funds, or securities

other than those mentioned in the Section (*in re* Dick, Lopes *v.* Hume-Dick [1891], 1 Ch. at p. 433, by Kay, L. J.), and therefore where the instrument creating the trust gives a wider range of investment than that given by the Act an express power to vary investments should be inserted.

It was held by Kekewich, J., in the case of *in re* Walker, Walker *v.* Walker (59 L. J., Ch. 386), that when a trust legacy has been appropriated, it is a breach of trust to vary the investment without reasonable cause, and upon the legacy falling into possession the trustee is liable to indemnify the legatee against any loss resulting from the change of investment.

It must be borne in mind that Sections 1 and 7 of The Trust Investment Act, 1889, are still unrepealed. The bodies referred to in Section 7 of that Act will have to consider the effect of the repeal of the Sections enumerating the authorised investments. It is apprehended that Sub-section 1 of Section 38 of The Interpretation Act, 1889 (52 & 53 Vict. c. 63), applies, and that Section 7 of the Act of 1889 must henceforth be construed as referring to the stocks, funds, shares, or securities in which trustees are authorised by the present Act to invest (see *in re* Manchester Royal Infirmary, Manchester Royal Infirmary *v.* Attorney-General, 43 Ch. D. 420, at p. 427).

On reference to Section 7 of The Trust Investment Act, 1889 (*ante*, p. 17), it will be noticed that the bodies therein referred to are, in accordance with a well-recognised principle of municipal legislation, debarred from investing in any stocks, funds, shares, or securities issued or created by themselves, or in real or heritable securities.

Purchase at a premium of redeemable stocks.

2. (1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in Section One of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned or referred to in Sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of Section One, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the Sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

Section 2.—By the rules of equity trustees, however ample their powers of investment, were not justified in investing in determinable securities (Stewart *v.* Sanderson, L. R., 10 Eq. 26). This Section, however, authorises the investment of trust funds in any of the securities mentioned or referred to in Section 1 of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value, but so, nevertheless, that trustees are not to invest in any stock mentioned or referred to in Sub-sections (*g*), (*i*), (*k*), (*l*), and (*m*) of Section 1, at a price exceeding its redemption value, if such stock is liable to be redeemed within fifteen years from the time of investment at par, or at some other fixed rate, or invest in any such stock as is mentioned or referred to in those Sub-sections if it is liable to be redeemed at par or at some other fixed rate, and its price exceeds fifteen per cent. above par or such other fixed rate.

Notwithstanding, however, the provisions of this Section the Court, in exercising its discretion with regard to the investment of cash under its control, would probably, in most cases, give preference to irredeemable securities (Roberts *v.* Morgan, 23 L. R. Ir. 118, and *re* Phelan, *ibid.* 336).

Trustees, in exercising the power of investment given by this Act, should, whilst looking to the circumstances of the case and the position of the parties beneficially entitled, bear in mind that it is their duty, as far as may be, to keep the fund intact for the persons entitled in remainder (Hume *v.* Richardson, 4 De G. F. & J. 29).

Sub-section 3.—This enables trustees to retain redeemable securities until the time fixed for redemption without incurring any liability for loss occasioned thereby to the trust estate. Trustees, however, when retaining redeemable securities, must act in good faith and without negligence.

Discretion of trustees.

3. Every power conferred by the preceding Sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

Section 3.—"According to the discretion of the trustee."—The Court will not interfere with the discretion of trustees in the exercise of a power to vary securities unless such power is exercised in an improper manner or upon unreasonable grounds (Lee *v.* Young, 2 Y. & C. C. 532).

"Subject to any consent required by the instrument, if any, creating the trust."—If consent be necessary to the exercise of the power, it must be procured in strict accordance with the requirements of the trust instrument. A prospective consent is bad, and would not protect trustees if charged with breach of trust (Child *v.* Child, 20 Beav. 50). So a subsequent consent will not exonerate the trustees (Bateman *v.* Davis, 3 Madd. 98), unless the person whose consent is necessary by some act of his afterwards shows his acquiescence,

as where he receives dividends arising from the new investment without objection (Stevens *v.* Robertson, 37 L. J., N. S., Ch. 499, and *re* Massingberd, Clark *v.* Trelawney, 63 L. T., N. S. 296). And in some cases subsequent acquiescence would be ineffectual to shield the trustees—as, for instance, where the instrument creating the trust expressly requires a previous consent to any investment by the trustees (see Stevens *v.* Robertson, *supra*). If the trust instrument requires the consent to be in writing, that requirement should be strictly complied with (Cocker *v.* Quayle, 1 Russ. & My. 535, and Worthington *v.* Evans, 1 S. & S. 165). Consent will be presumed after a considerable lapse of time (*re* Adrian Birch, 17 Beav. 358).

Application of preceding Sections.

4. The preceding Sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

Section 4.—"And the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust."—Having regard to these words, the true mode of construing the power of investment given by the preceding Sections is to read into the instrument creating the trust the various enumerated securities, unless they are excluded by the express language of such instrument (*in re* Dick, Lopes *v.* Hume-Dick [1891], 1 Ch. 423, at p. 429, by Fry, L. J.; and Hume *v.* Lopes [1892], App. Cas. 112, at p. 117, by Lord Field).

Enlargement of express powers of investment.

5. (1) A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(*a*) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) On any charge, or upon mortgage of any charge, made under The Improvement of Land Act, 1864. 27 & 28 Vict. c. 114.

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the

instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under The Local Loans Act, 1875.

38 & 39 Vict. c. 83.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under The Isle of Man Loans Act, 1880.

43 & 44 Vict. c. 8.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in or upon the security of mortgage debentures duly issued under and in accordance with the provisions of The Mortgage Debenture Act, 1865.

28 & 29 Vict. c. 78.

Section 5.—It has been said that this Section does not operate so as to enlarge the general statutory powers of investment conferred by Section 1 of the Act, but is only applicable to cases where the powers of investment referred to are expressly given by a trust instrument, and this, save, perhaps, with regard to Sub-section 1, is in all probability the correct view of the scope and intention of the Section. Although no general rule can, by reason of the uncertainty of the practice as to the insertion of the marginal notes of Acts of Parliament on the Rolls of Parliament, be laid down as to how far the marginal notes of an Act can be used in interpreting it (see the remarks of Jessel, M. R., in Sutton *v.* Sutton, 22 Ch. D. 511, at p. 513, dissenting from *in re* Venour's Settled Estates, Venour *v.* Sellon, 2 Ch. D. 522), the marginal note of this Section certainly refers only to "the enlargement of express powers of investment." Moreover, some of the Sub-sections are clearly applicable only to cases where an express power is given, and it will be observed that Sub-section 1 refers, not like Section 1 of the Act to "the instrument (if any) creating the trust," but simply to "the instrument creating the trust," and that in Sub-sections 2, 3, and 4 reference is expressly made to "the instrument authorising the investment." It is however suggested that a trustee who takes a power of investment under his trust

instrument, and is not expressly excluded from investment in real securities, is within the scope of Sub-section 1, since that Sub-section makes no reference to "the instrument authorising the investment," but speaks only of "the instrument creating the trust," and the true mode of construing the powers of investment given by Section 1 of the Act is to read into the trust instrument the various enumerated securities (see Section 4, *supra*, and the notes thereto).

Sub-section 1 (*a*).—This Sub-section replaces Section 9 of The Trustee Act, 1888 (51 & 52 Vict. c. 59), which Act, with the exception of Sections 1 and 8, is repealed by the present Act.

Prior to the passing of The Trustee Act, 1888, and the cases mentioned below, the opinion of conveyancers and text-book writers was in favour of the view that "securities upon chattel interests for long terms of years not burdened with rent or covenants, such as the terms created by settlement or Will, with a view to raising money for portions or other purposes of family provision, were a suitable mode of investment of money authorised to be invested on real security" (Davidson's "Precedents and Forms in Conveyancing," vol. 3, p. 37; and "Lewin on the Law of Trusts," 8th edition, p. 337, Section 57). In the case of *in re* Chennell (8 Ch. 492, at p. 507), Jessel, M. R., is reported to have said that such an investment "would be justified if the leaseholds were held at a peppercorn rent for a long term without covenants and without impeachment of waste"; but on this *obiter dictum* being brought to his notice in *in re* Boyd's Settled Estates (14 Ch. D. 626) he expressed his opinion that, as a general rule, long terms of years did not answer the description of "real securities." In this state of uncertainty the law remained until the case of Leigh *v.* Leigh (W. N. [1886] 191; 35 W. R. 121), in which Stirling, J., held that long leaseholds (in the case in question of 1000 years and 1500 years respectively, being terms for raising portions) were not "real securities."

The effect of this Sub-section in cases where it applies is similar to that of Section 9 of the Act of 1888, and makes an investment upon mortgage of property held for a long term of years a "real security." The Sub-section too, like the corresponding Section of the Act of 1888, has a retrospective operation.

To bring the term within the meaning of a real security—

(1) It must at the date of investment being effected have still not less than two hundred years to run.

(2) The rent reserved must not exceed a shilling a year.

(3) The term must not be subject to any right of redemption.

(4) The term must not be subject to any condition for re-entry except for nonpayment of rent.

As to (3), the right of redemption here referred to is not the right which must of necessity, from the nature of the transaction where a mortgage is effected, exist between the trustee, who advances the money, and his mortgagor, but a trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term in question.

It would seem that even if the term mortgaged to a trustee complied with the conditions making it convertible under The Conveyancing Acts, 1881 and 1882 (44 & 45 Vict. c. 41, Section 65, and 45 & 46 Vict. c. 39, Section 11), into a freehold, the trustee to whom it is mortgaged could not so convert it, as it would be improper to allow him to change the nature of his mortgagor's estate.

Sub-section 1 (*b*).—This is in effect a re-enactment of that portion of Section 60 of The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), which relates to trustees, and is repealed by this Act (see Section 51 and Schedule).

Sub-section 2.—This is a re-enactment of the authority given to trustees to invest in debenture stock by The Debenture Stock Act, 1871 (34 & 35 Vict. c. 27), that Act being wholly repealed by the present Act (see Section 51 and Schedule).

Sub-section 3.—This is a re-enactment of Section 27 of The Local Loans Act, 1875 (38 & 39 Vict. c. 83), such Section being for the purpose of consolidation repealed by this Act.

Sub-section 4.—This is a re-enactment of Section 7 of The Isle of Man Loans Act, 1880 (43 & 44 Vict. c. 8), which Section, so far as it relates to trustees, is repealed by the present Act (see Section 51 and Schedule).

Sub-section 5.—This is a re-enactment of Section 40 of The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), such Section being repealed by the present Act (see Section 51 and Schedule).

It is provided by The Mortgage Debenture Act, 1865, that a company, to entitle it to issue mortgage debentures under the Act, must under its special Act, or its Memorandum of Association, be limited to the following objects:— 1. The making of advances of money upon any of the following securities:— (*a*) Lands, messuages, hereditaments, and real property, and all estates and interests therein; (*b*) Rates, dues, assessments, and impositions upon the owners or occupiers of lands or real property imposed by or under the authority of any Act of Parliament, public or private, Royal Charter, Commission of Sewers or Drainage, or other sufficient legal authority; (*c*) Charges or securities upon or affecting lands, messuages, hereditaments, and real property executed, made, given, or issued under the authority of any Act of Parliament, public or private. 2. The borrowing of money on transferable mortgage debentures or upon one or more of the securities above mentioned. And, in addition, the company must have a paid-up capital of not less than £100,000, in shares of the nominal value of not less than £50, of which not less than one tenth, nor more than one half, must have been paid up.

Under the provisions of The Mortgage Debenture Act, 1865, and The Mortgage Debenture Amendment Act, 1870 (33 & 34 Vict. c. 20), the securities upon or in respect of which such mortgage debentures may be founded and issued must be securities affecting property in England or Wales of the following description:— (*a*) Lands, messuages, hereditaments, or real property, or some estate or interest therein; (*b*) Rates, dues, assessments, or impositions upon the owners or occupiers of lands, messuages, hereditaments, or real property, imposed by or under the

authority of any Act of Parliament, public or private, Royal Charter, Commission of Sewers or Drainage, or other sufficient legal authority; (*c*) Charges upon or affecting lands, messuages, hereditaments, or real property executed, made, given, or issued under the authority of any Act of Parliament, public or private. But from the securities described in Paragraph (*a*) are excepted securities upon mines or mineral properties, quarries, brickfields, factories, mills, and other buildings or works for manufacturing purposes, and also securities upon leasehold estates determinable upon a life or lives, and not renewable, or held for a term, of which at the date of the security less than fifty years shall be unexpired, or which are held at a rent beyond one fourth part of the annual value of the property leased as estimated at the date of the security given to the company, and verified by the statutory declaration of a surveyor as therein provided, or which are subject to any rent beyond a nominal rent or a ground rent.

Power to invest notwithstanding drainage charges.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of The Public Money Drainage Acts, 1846 to 1856, or The Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under The Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

10 & 11 Vict. c. 32.

Section 6.—The object effected by this Section is the practical re-enactment of Section 37 of The Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101); Section 53 of The Landed Property Improvement (Ireland) Act, 1847 (10 & 11 Vict. c. 32); and Section 61 of The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), severally repealed by this Act (see Section 51 and Schedule).

Trustees not to convert inscribed stock into certificates to bearer.

7. (1) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following Acts, that is to say:

(*a*) The India Stock Certificate Act, 1863; 26 & 27 Vict. c. 73.

(*b*) The National Debt Act, 1870; 33 & 34 Vict. c. 71.

(*c*) The Local Loans Act, 1875; 38 & 39 Vict. c. 83.

(*d*) The Colonial Stock Act, 1877. 40 & 41 Vict. c. 59.

(2) Nothing in this Section shall impose on the Bank of England or of Ireland, or on any person authorised

to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Section 7.—This Section practically re-enacts Section 4 of The India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73); Section 29 of The National Debt Act, 1870 (33 & 34 Vict. c. 71); Section 21 of The Local Loans Act, 1875 (38 & 39 Vict. c. 83); and Section 12 of The Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), which are severally repealed by the present Act (see Section 51 and Schedule).

Loans and investments by trustees not chargeable as breaches of trust.

8. (1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled

to require, if, in the opinion of the Court, the title accepted be such as a person acting with prudence and caution would have accepted.

(4) This Section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 8, *Sub-section* 1.—This is in effect a re-enactment of Sub-section 1 of Section 4 of The Trustee Act, 1888, that Section being repealed by the present Act (see Section 51 and Schedule). The Sub-section referred to is in the following terms:—"No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situated or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this Section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend." There is some difference between the wording of the repealed Sub-section and that of the Sub-section of the present Act now under consideration, and it will be observed that the provision at the end of the repealed Sub-section that the "Section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which a trustee can lawfully lend," is omitted. The two Sub-sections are, however, it is conceived, the same in effect.

Previously to the passing of The Trustee Act, 1888, the rule was that a trustee before advancing trust money on mortgage ought to make due inquiry with regard to the value of the property offered as security (Bell *v.* Turner, L. R., 17 Eq. 439), and to have an independent valuation of it made on his own behalf (Ingle *v.* Partridge No. 2, 34 Beav. 411) by a competent valuer, with local knowledge sufficient to enable him to arrive at a valuation (Budge *v.* Gummow, 7 Ch. D. 719, see p. 722; Fry *v.* Tapson, 28 Ch. D. 279), who had been instructed that the advance was to be made out of trust money, and that it was desired to ascertain the actual value of the property (*in re* Olive, Olive *v.* Westerman, 34 Ch. D. 70). Trustees infringing the rule,

although acting in good faith, were also made liable, such infringement being a breach of trust, and even the employment by them of competent solicitors was held to be no excuse, on the ground that the appointment of a competent valuer was not within the scope of the solicitor's employment, but was a matter as to which the trustees ought to have exercised their own judgment (Fry *v.* Tapson, 28 Ch. D. 268, 280, 282).

It was also laid down by the Courts of Equity that the amount in proportion to the value of the property proposed as a security which trustees with power to invest upon mortgage ought to advance was two thirds where the property was of a permanent value, as freehold land (Stickney *v.* Sewell, 1 My. & Cr. 8; Macleod *v.* Annesley, 16 Beav. 600; Ingle *v.* Partridge No. 2, 34 Beav. 411; Smethurst *v.* Hastings, 30 Ch. D. 498; Learoyd *v.* Whiteley, 12 App. Cas. 727, 733), and one half where the property was house property (Norris *v.* Wright, 14 Beav. 291; Fry *v.* Tapson, 28 Ch. D. 268).

It has been said that the rule was only a general rule (see "Lewin on Trusts," 9th ed., p. 357), and not a hard and fast one (*in re* Olive, Olive *v.* Westerman, 34 Ch. D. at p. 73; Learoyd *v.* Whiteley, 12 App. Cas. 733, 734); still a trustee who disregarded it took upon himself a great risk (*in re* Salmon, Priest *v.* Uppleby, 42 Ch. D. 351, 369, 370). It is clear that, whilst on the one hand where trustees, acting in good faith upon the representations of competent persons as to the permanency of the value of the mortgaged property, or as to an anticipated advance in such value, had to some slight extent infringed the rule, they would probably have been protected by the Court, there are cases on the other hand where it has been decided that upon certain classes of real property—as, for instance, premises depending for their value upon some trade carried on upon them—trustees, according to circumstances, would not be justified in making advances at all, or would only be justified in making advances far smaller, in proportion to the estimated value, than those authorised by the rule (Stickney *v.* Sewell, 1 My. & Cr. 8; Royds *v.* Royds, 14 Beav. 54; Stretton *v.* Ashmall, 3 Dr. 12; Budge *v.* Gummow, 7 Ch. D. 719; and Learoyd *v.* Whiteley, 12 App. Cas. 733).

The rules governing advances of trust money were, however, materially altered by The Trustee Act, 1888. After the commencement of that Act no trustee who prior to such commencement had advanced or thereafter should advance trust money on mortgage security, in accordance with the terms of the trust instrument, could be charged with breach of trust, by reason of the proportion borne by the amount of the loan to the value of the property forming the security, if it were found that the trustee, when making the loan, was acting upon a report as to the value made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed by the trustee independently of any owner of the property, and with a view to the particular investment (*in re* Walker, Walker *v.* Walker, 59 L. J., N. S., Ch. 386), whether such surveyor or valuer carried on business in the locality where the property was situated or elsewhere, and that the amount of the loan did not exceed two equal third parts of the value of the property as stated in such report. The Trustee Act, 1888, abolished the rule

which required the valuer employed to be a person having local knowledge and experience (see Budge *v.* Gummow, *ubi supra*).

It was held by Kekewich, J., in the case of *in re* Somerset, Somerset *v.* Earl Poulett ([1894] 1 Ch. 231), that the words "believed to be" in Sub-section 1 of Section 4 of The Trustee Act, 1888, do not govern the words "instructed and employed independently of any owner of the property," and therefore, in order to entitle a trustee lending money on the security of real property to the protection of the Section, he must be able to show that the surveyor or valuer on whose report he acted was in fact so instructed and employed.

The rules introduced by Section 4 of the Act of 1888 will continue to govern advances of trust money upon mortgage security, since the Section referred to is in effect re-enacted and restored by the present Act.

It might be suggested that the omission from this Sub-section of the provision contained in the latter part of Sub-section 1 of Section 4 of the Act of 1888, as to the Section applying to a loan on any property of any tenure, "whether agricultural or house or other property," restored the rule of equity as to two thirds on land and one half on houses. It is, however, submitted that the provision referred to was inserted in the Sub-section of the repealed Act by way of abundant caution, rather than because it was absolutely necessary, and that the language of the Sub-section of the present Act, at least, is sufficient to abrogate the rule without any special provision, for it extends to a trustee lending money on the security of any property, if he acts on a report as to value in accordance with the terms of the Act, and the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report. Of course the property upon the security of which the advance is made must be of such a kind as the trustee is authorised by law, or by the instrument creating the trust, to invest upon the security of. It must also be borne in mind that neither the repealed Act of 1888 nor this Sub-section of the present Act has enlarged the powers of trustees as to the description of property to be accepted as a security, or absolved them when investing trust moneys from using the reasonable caution of prudent men.

It should be remembered that the duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; it is rather to take such care "as an ordinarily prudent man would take if he were minded to make an investment for the benefit of other people, for whom he felt morally bound to provide" (*in re* Whiteley, Whiteley *v.* Learoyd, 33 Ch. D. 347, at p. 355). This shows in effect that the true rule which should govern the conduct of trustees is that a trustee in performing the duties incident to his position should act as an ordinarily prudent man of business would act if acting for other persons, with a due regard to the respective positions and interests of such persons—a standard far different from that which is supposed to be the guide for trustees.

When trustees have complied with the requirements of the Act as to valuation, and have otherwise acted with prudence, they will not, it is conceived, be liable for loss through subsequent depreciation (*in re* Whiteley, Whiteley *v.* Learoyd, 33 Ch. D. 347; affirmed 12 App. Cas. 727, *sub nom.* Learoyd *v.* Whiteley).

The position of a trustee committing an honest breach of trust has also been modified by Section 3 of The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35).

The change introduced by the Act of 1888 in the rules of equity as to the proportion of the advance to the value of the security was a much needed one, and probably relieved the majority of trustees having power to invest on mortgage from liability; for in practice the rule was constantly infringed, as a rigid adherence to it would have almost shut out trustees from investments on house property, the owners of which would rarely be content with so small an advance as one half of the actual value.

Trustees, notwithstanding the latitude now given them, must not forget their usual prudence and circumspection, but bear in mind that they are not warranted in advancing trust moneys upon contributory mortgage, or in doing what is sometimes done by careless trustees—namely, lending the trust moneys on a second, third, or other postponed security. In such cases the law wholly ignores the transaction, and the trustee so acting does so at his peril, and must replace the money advanced, and make good any loss.

Sub-section 2.—This is a re-enactment of Sub-section 2 of Section 4 of the Act of 1888.

By Section 2 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), it was enacted that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold." By Section 3 of the same Act it was also provided that "trustees who are either vendors or purchasers might buy or sell without excluding the application of the Second Section." This Act, for the purposes of consolidation, repeals Section 3 of the Act referred to (see Section 51 and Schedule), and re-enacts it (see Section 15, *infra*).

By Section 13 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it was enacted that "under a contract to sell or assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion."

By Section 66 of the same Act it is provided that trustees, executors, and other persons in a fiduciary position are not to be deemed guilty of neglect or breach of duty, or become in any way liable for omitting to negative in any contract the inclusion of the provisions or stipulations of that Act.

Trustees, however, were not by either of the Acts referred to relieved, when investing on leasehold security, from seeing that the title was in all respects a marketable one, and therefore of investigating the lessor's title.

The provision made by The Trustee Act, 1888, was much needed, for the result of the practice, which had grown up, of inserting in agreements for leases, and in the conditions under which leaseholds were sold, a stipulation that production of the lessor's title should not be required, combined with The Vendor and Purchaser Act, 1874, and The Conveyancing and Law of Property Act, 1881, was practically to debar trustees, unless they were willing to incur the liability of being charged as for a breach of trust, from investing on leasehold securities.

It must, however, be borne in mind by trustees that the obligation to require production of the lessor's title is not absolutely removed, but only where the title accepted is such as in the opinion of the Court a person acting with prudence and caution would have accepted. And it is conceived that, save perhaps in the case where the freehold title is very well known, a trustee would not be justified in advancing trust money upon the security of a recently granted lease, but should require such length of title to the leasehold interest as afforded, from lapse of time and other circumstances, a presumption that the lease is subsisting and unimpeachable.

Sub-section 3.—This is a re-enactment of Sub-section 3 of Section 4 of the Act of 1888.

Before the passing of the Act of 1888 the rule of equity was that trustees, empowered or directed to lay out trust money in the purchase of real estate, ought not to accept a title unless strictly marketable, and departure from it was only allowed where the title was substantially a safe holding one, and the acquisition of the particular property was of importance to the trust (*re* Sheffield and Rotherham Railway Co., 1 Sm. & Giff. App. IV.), or where the property purchased was a large one, and the want of a marketable title extended only to small and outlying portions of it. The rule applicable to trustees having power to advance trust money on real or leasehold security was that in so doing they ought to see that the title to the property proposed as a security was a marketable one.

Prior to The Vendor and Purchaser Act, 1874, a title to real estate, to be a marketable one, must have gone back over a period of sixty years at the least, but the period of forty years has now been substituted by that Act, which, by its First Section, enacts as follows:—"In the completion of any contract of sale of land made after the 31st day of December, One thousand eight hundred and seventy-four, and subject to any stipulations to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require, in the place of sixty years, the present period of such commencement. Nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required."

As to the meaning of the word "land" in Acts of Parliament see Section 3 of The Interpretation Act, 1888 (52 & 53 Vict. c. 63).

Before the enactment comprised in Section 2 of The Vendor and Purchaser Act, 1874, in order to make a marketable title to leasehold property (other than property held under a bishop's lease), it was necessary to show the title to the freehold as well as the title to the term.

It will be seen, therefore, that before the passing of The Trustee Act, 1888, trustees for purchase, in the absence of an express authority in their trust instrument, could not with safety purchase real estate under a contract containing stipulations restrictive of their right to require a title going back over a period of forty years at the least (*ex parte* the Governors of Christ's Hospital, 2 Hem. & M. 166, 168); and although on purchasing property held

for a term of years they might have dispensed with the production of the freehold title, they were bound to require a title commencing with the original lease, and showing the subsequent assignments. Since the passing of the Act of 1888, however, trustees having authority to purchase or invest on the security of any property are no longer liable to be charged with breach of trust merely for having accepted a title shorter than that which they might legally have required. But as the title accepted must be such as, in the opinion of the Court, a person acting with prudence and caution would have accepted, trustees must still use circumspection in exercising trusts for purchase or investment, and would, it is conceived, be liable for accepting a title commencing at a recent date, save perhaps where the title was a very well known one, or, in the case of a purchase, where the property was small and its possession of importance to the trust.

The word "property" in this Act includes "real and personal property, and any estate and interest in any property, real or personal" (see Section 50, *infra*), and therefore extends, it is apprehended, to leaseholds, so that a trustee purchasing or investing on the security of property of that description would, where the term was of old creation, be justified in dispensing with the full title, provided that the creation of the term were shown, together with the mesne assignments for the past forty or fifty years.

Sub-section 4.—This Sub-section is practically a re-enactment of Sub-section 4 of Section 4 of The Trustee Act, 1888.

The word "investment" in this Sub-section extends, it is conceived, as well to investments in the purchase of as to investments on the security of property to which the Section applies.

It will be observed that the retrospective force given to the Act by this Sub-section is not to operate in respect to any investment made before the commencement of the Act, where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888, the time when the Act of 1888 was passed and came into operation.

Liability for loss by reason of improper investments.

9. (1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This Section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 9.—This is a re-enactment of Section 5 of The Trustee Act, 1888, that Section being repealed by the present Act (see Section 51 and Schedule).

A trustee is not entitled to the protection afforded by this Section unless the investment which proves deficient was a proper investment at the time when made in all respects other than value (*in re* Walker, Walker *v.* Walker, 59 L. J., Ch. 386).

The object of the Section is to provide that when a trustee has advanced more money on mortgage of a property than was reasonably prudent, and the estate fails, then he is not to be chargeable with the whole, but only with so much as would have been a loss if the real value at the time of investment had been taken, and not the value the trustee put upon it (*in re* Walker, Walker *v.* Walker, *ut supra*). Since the passing of the Act of 1888 the proper course, therefore, has been to value the security, and to charge the trustees with any excess in the amount of the loan over the sum which ought properly to have been advanced in proportion to the value of the security at the time when the advance was made.

Where this Section does not apply, the practice of the Courts, where the security is deficient, is to order the security to be realised and to charge the trustees with the insufficiency (Stickney *v.* Sewell, 1 My. & Cr. 8; Ingle *v.* Partridge No. 2, 34 Beav. 411; *in re* Whiteley, Whiteley *v.* Learoyd, 33 Ch. D. at p. 354); and where in such a case a trustee who invests on an insufficient security retires, the new trustee may realise the security without notice to the old trustee, and charge him with the deficiency (*in re* Salmon, Priest *v.* Uppleby, 42 Ch. D. 351).

Sub-section 2.—It will be observed that the Section has a retrospective operation, save where some action or other proceeding with reference to the investment was pending on the 24th day of December, 1888, the time when the Act of 1888 came into operation.

PART II.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of appointing new trustees.

10. (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee for the whole or any part of trust property—

(*a*) The number of trustees may be increased; and

(*b*) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees: or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(*c*) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this Section from his trust unless there will be at least two trustees to perform the trust; and

(*d*) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this Section relative to a trustee who is dead include the case of a person nominated trustee in a Will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section.

(5) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This Section applies to trusts created either before or after the commencement of this Act.

Sections 10, 11, and 12 re-enact, with some slight verbal alterations, Sections 31, 32, and 34 of The Conveyancing Act, 1881; Section 5 of The Conveyancing Act, 1882; and Section 6 of The Conveyancing Act, 1892, and deal with the appointment of new trustees, and the vesting of the trust property consequent on such appointment. Taking the Sections and Subsections in question in order, the following notes may assist in the elucidation of their provisions.

Section 10.—Before examining in detail the provisions of this Section it should be pointed out that the Section having replaced Sections 31, 32, and 34 of The Conveyancing Act, 1881, will be read in lieu of those Sections in Section 3 of The Trustees Appointment Act, 1890 (which amends 13 & 14 Vict. c. 28, as extended by 32 & 33 Vict. c. 26). This Act relates exclusively to land acquired by trustees in connection with any society or body of persons, comprising several congregations or other sections or divisions or component parts associated together for any religious purpose. As this Act deals with topics not within the subject matter of this book it would be out of place to further comment on it.

Sub-section 1.—The cases in which the powers conferred by this Sub-section come into operation range themselves under six heads.

Where a trustee, either original or substituted, and whether appointed by a Court or otherwise—

1. Is dead.
2. Remains out of the United Kingdom for more than twelve months.
3. Desires to be discharged from the trusts or powers reposed in or conferred on him.
4. Refuses to act therein.
5. Is unfit to act therein.
6. Is incapable of acting therein.

The trustee may be—

(i.) Original.

(ii.) Substituted (*a*) by a Court; (*b*) or otherwise.

The definition of "Trustee" in Section 50 includes an executor or administrator, and a trustee (not being a mortgagee) whose trust arises by construction or implication of law, as well as an express trustee, and does not exclude the official trustees of charitable funds. But an executor as such cannot after probate be replaced or resign, though, if bankrupt, he can be restrained from acting further (Bowen *v.* Phillips [1897], 1 Ch. 174; and see Eaton *v.* Davies, W. N. [1894] 32, and *in re* Willey, W. N. [1890] 1, commenting on *in re* Moore, 21 Ch. D. 778).

By "Original Trustee" is meant a trustee nominated and appointed in the original document, whether Will, settlement, or otherwise, creating the trust.

A "Substituted Trustee" is one appointed by the Court, or a trustee appointed by a person having a valid power of so doing, or may be one to whom the powers of trustee devolve by operation of law. This last case seems to be covered by the words "or otherwise."

1. *Where a Trustee is Dead.*

It should be borne in mind that where a sole trustee dies, notwithstanding any testamentary disposition, trust and mortgage estates (except copyholds), by virtue of The Conveyancing Act, 1881, Section 30, now vest in his personal representatives.

2. *Where a Trustee Remains out of the United Kingdom for more than Twelve Months.*

The months here mean calendar months, in accordance with The Interpretation Act, 1889 (52 & 53 Vict. c. 63, Section 3).

As to this being a good ground for appointing a new trustee in the place of such absent trustee, the case of *re* Coates and Parsons (34 Ch. D. 370) is an authority in point (see also *re* Walker and Hughes's Contract, 24 Ch. D. 698). *Re* Coates and Parsons shows (i.) that the persons who are continuing to act as trustees have the power of appointing new trustees without the concurrence of a person who is ceasing to be a trustee by virtue of the appointment; (ii.) that the subsequent provisions in Sub-section 4, which provide that the provisions "relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section," only include a retiring trustee when it can be shown that the retiring trustee is competent and willing to act in the exercise of the provisions of the Section. As a rule, unless the retiring trustee expressly intimates his desire to join in the appointment of the new trustees, it would be wiser to assume that he is not so willing, and appoint without it. As to what "being abroad" means see Earl of Stamford, Payne *v.* Stamford ([1896] 1 Ch. 288). This Sub-section indicates a period which sets at rest any question as to what amount of absence is sufficient to justify the exercise of the power—a question which may still arise where the Court is called on to exercise its power of appointing on the ground that a trustee is out of the jurisdiction, which is treated of hereafter, and on which the case of Hutchinson *v.* Stephens (5 Sim. 499) is a useful decision.

3. *Where a Trustee Desires to be Discharged from the Trusts or Powers reposed in or conferred on him.*

This simply gives a statutory power of retiring, which previously all well-drawn forms of powers contained. This power can, of course, be excluded, though it would be unwise and unjust so to do, since by Sub-section 5 of the Section now under discussion it applies only if and as far as a contrary intention is not expressed in the instrument.

It may be as well to note here (though the remark applies equally to other cases of a trustee retiring) that a trustee should not part with his control over the fund until the new trustee (if any) is properly appointed (Pearce *v.* Pearce, 22 Beav. 248). The retiring trustee need not be party to the deed appointing the new trustee, though it is usual for him to be so to put on record his desire to retire (see *re* Norris, Allen *v.* Norris, 27 Ch. D. 333; and *re* Coates and Parsons, 34 Ch. D. 370). An executor as such cannot resign or retire, but after administration his duties merge into those of a trustee, and he may usually resign as trustee (see Dix *v.* Burford, 19 Beav. 409; Phillips *v.* Munnings, 2 My. & Cr. 309; Noble *v.* Brett, 24 Beav. 510, 511; Stephens *v.* Venables No. 1, 30 Beav. 625; Ballard *v.* Marsden, 14 Ch. D. 374; *re* Smith, Henderson-Roe *v.* Hitchens, 42 Ch. D. 303; Crawford *v.* Forshaw, 43 Ch. D. 646).

4. *Where a Trustee Refuses to Act therein.*

Refusal to act may be either before assenting to become a trustee or after it. In the former case it is the same as disclaimer, and this Sub-section therefore applies to the case of a disclaimer. It is true there has been no decision clearly laying down that "refusal" does include disclaimer; but in D'Adhemar *v.* Bertrand (35 Beav. 19) it was assumed that the similar Section in Lord Cranworth's Act (Section 27) did comprise disclaimer. Up to the instant of disclaimer the estate vested in the trustee remains in him, and disclaimer of the powers of trustee will operate to disclaim the estate without any formal act (*re* Birchall, Birchall *v.* Ashton, 40 Ch. D. 436). No express assent is necessary to vest the estate in a trustee; the mere appointment does this; but obviously no person is bound to accept such an onerous position, and may decline it, even if, for instance, he may before the death of a testator have agreed to be a trustee of his Will. Disclaimer may be evidenced by conduct without express declaration. But it is advisable that it should be evidenced by writing, usually a deed, though this is not necessary. The case of *re* Birchall, Birchall *v.* Ashton (40 Ch. D. 436), shows that even where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal estate (see also Smyth *v.* Smyth, 6 Barn. & Cress. 112; Doe *v.* Harris, 16 M. & W. 517).

It is particularly advisable to evidence by deed the disclaimer of a devise in trust of land, as the disclaimer forms a link in the title. A trustee cannot disclaim part of a trust (*re* Lord and Fullerton's Contract [1896], 1 Ch. 228; and see *infra*, p. 57, note to Section 11).

In connection with the subject of disclaimer, reference may here be made to Section 52 of The Conveyancing Act, 1881, coupled with Section 6 of The Conveyancing Act, 1882, under which one trustee may disclaim a power without vitiating the exercise of it by the remaining trustees, in whom it will vest and be validly exerciseable, thus putting disclaimer of a power on the same footing as disclaimer of an estate.

5. *Where a Trustee is Unfit to Act therein.*

As to the exact nature of the unfitness which will authorise the exercise of the power of appointment there are not many decisions, for the obvious reason that in cases where it is proposed to remove a trustee out of Court for unfitness, the trustee will usually retire of his own accord, and then the case falls under the head of the trustee being desirous of retiring, or if he declines to do so an application to the Court might then have to be made. This much, however, is clear, that bankruptcy is unfitness, and a trustee can be called upon to resign who is bankrupt (see *re* Roche, 2 Dr. & W. 287; *re* Adam's Trusts, 12 Ch. D. 634, at p. 639; *re* Barker's Trusts, 1 Ch. D. 43; Bowen *v.* Phillips [1897], 1 Ch. 174; and Section 25, Sub-section 1, of this Act). As to the principles which will guide the Court in exercising its jurisdiction of removing a trustee for unfitness—a jurisdiction of a delicate character—the case of Letterstedt *v.* Broers (L. R., 9 App. Cas. 371) is useful.

The result appears to be that where it is clear that the Court would exercise its inherent jurisdiction of removing a trustee for "unfitness," it would be equally safe for the person having the power of appointment as indicated by this Section to exercise it, and to insist on the retirement of a trustee who is clearly unfit. If he resist and render a resort to the Court necessary he may have to pay the costs so occasioned.

6. *Where a Trustee is Incapable of Acting therein.*

Under this head comes lunacy or unsoundness of mind (where a person has not been found lunatic, but is still incapable of managing his own affairs), but not infancy or coverture.

Lunacy.—As to the power of the Court in cases of lunacy see *re* Shortridge ([1895] 1 Ch. 278). The case of *re* Elizabeth Blake (W. N. [1887] 173) is decisive that the Section under discussion would apply, as it is merely a re-enactment of Section 31 of The Conveyancing Act, 1881; and it is apprehended the same rule would apply to a case of unsoundness of mind, though not so found (see also notes, *infra*, on Section 25, and *re* Cutler, 99 L. T. 62).

Marriage.—Marriage is clearly not such an incapacity as is here intended. In fact, a married woman can—under The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by virtue of Section 1, Section 18, and Section 24 of that Act—act as a trustee (see *re* Hawksworth, W. N. [1887] 113). While it seems perfectly clear that there is nothing to prevent a married woman being a trustee, and that coverture, in short, is not an incapacity, the question may arise, especially in relation to real property vested in a *feme coverte* trustee, whether it is necessary that she should acknowledge a deed conveying it. It has been suggested that the provisions of The Married Women's Property Act, 1882, *primâ facie* at least, relate only to property to which the married woman is *beneficially* entitled (see 1 Key & Elphinstone's "Precedents in Conveyancing," p. 257 and n. p. 541), and this view has now been decided to be the correct one in *re* Harkness and Allsopp's Contract ([1896] 2 Ch. 358). In future, therefore, where an interest in land is vested in a married woman (whether married before or after the Act) as a trustee, her husband must join in a deed acknowledged (as to which see The Conveyancing Act, 1882, Section 7), unless, perhaps, the case comes clearly within Section 6 of The Vendor and Purchaser Act, 1874, and the married woman is a bare trustee within that Section (see *re* Docwra, Docwra *v.* Faith, 29 Ch. D. 693). It is safer in all such cases to have the deed acknowledged.

Infancy.—The position of an infant appointed a trustee is peculiar. Infancy is only a disqualification *sub modo*. Where the Court has been called upon to appoint a new trustee in the place of an infant trustee, it has done so without prejudice to any application by the infant to be restored to the trusteeship on coming of age. It is difficult to see in what manner the power could be exercised by a private person: hence this Section cannot apply to the case of incapacity arising from infancy, and an application to the Court would be necessary (*re* Brunt, W. N. [1883] 220; and *re* Tallatire, W. N. [1885] 191).

Where the power of appointing new trustees is vested in a tenant for life, and he has alienated his life estate, the power is not affected (Hardaker *v.* Moorhouse, 26 Ch. D. 417; see also *re* Bedingfield and Herring's Contract [1893], 2 Ch. 332).

The pendency of an administration action does not take away the power of appointing new trustees; but the power should be exercised subject to the approval of the Court (*per* Jessel, M. R., in Tempest *v.* Lord Camoys, 21 Ch. D., at p. 578). It will usually be found convenient to obtain a direction in the pending proceeding that the trustee in whom the power of appointment is vested should obtain the Court's sanction to the appointment he makes (*re* Norris, Allen *v.* Norris, 27 Ch. D. 333).

The Section next deals with the persons who can exercise the power: "*Then the person or persons nominated for the purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may,*" &c.

Thus the persons are—

(i.) The person or persons nominated by the instrument, if any, creating the trust.

(ii.) The surviving or continuing trustee or trustees for the time being.

(iii.) The personal representatives of the last surviving or continuing trustee.

(i.) *The Person or Persons Nominated by the Instrument, if any, creating the Trust.*

The whole of this Section is subject to Sub-section 5, which provides that it "applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained." As to what is "a contrary intention" within the meaning of this Sub-section see note to Sub-section 5 of this Section, *infra*, p. 56.

The words "person or persons nominated for the purpose of appointing new trustees by the instrument creating the trust" refer to the person or persons nominated for the purpose of appointing new trustees in the particular event which has happened. Where, therefore, by a trust instrument persons named were empowered to appoint new trustees in certain specified events, including the event of a trustee becoming incapable, but not including the event of a trustee becoming unfit, and one of the trustees became unfit but not incapable, the appointment of a new trustee ought to be made, not by the persons nominated in the trust instrument, but by the continuing trustees under the provisions of the Act (*re* Wheeler and De Rochow [1896], 1 Ch. 315).

The phrase "*the instrument, if any, creating the trust*" shows that the powers of this Section apply to trusts, whether created by writing or not, which is made more evident by the definition in Section 50, where "trust" is defined as including "implied and constructive trusts." The term "instrument" includes a deed of any kind, will, charter, Act of Parliament (see Section 50 of this Act), and, it is apprehended, a simple declaration of trust, &c., in writing, even though not under the hand and seal of the creator of the trust.

"*Or if there is no such person, or no such person able and willing to act.*"—Even if there are persons nominated to appoint, yet if they decline, or cannot agree to appoint, as where husband and wife are living apart and refuse to concur in appointing a new trustee, the power will be exerciseable by the other persons mentioned in the Section (*re* Sheppard's Settlement Trusts, W. N. [1888] 234).

(ii.) *The Surviving or Continuing Trustee or Trustees for the time being.*

By "continuing trustee" is meant one who is to continue to act in the trusts after the completion of the appointment (*re* Coates and Parsons, 34 Ch. D. 370), and does not include a trustee who has made up his mind to retire (*re* Norris, Allen *v.* Norris, 27 Ch. D. 333), unless he is willing to act for the purpose of filling up the intended vacancy. "Continuing trustee" does then include such a retiring trustee, and he is entitled to join in appointing if he so desires, since Sub-section 4 of the Section now under discussion enacts that "the provisions of this Section relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section." There is, however, no necessity for his doing so if he does not wish to (*re* Norris, Allen *v.* Norris, *supra*).

In Cradock *v.* Witham (W. N. [1895] 75) it had not been known for many years who was the heir of the last surviving nominor, and it was held that the surviving and continuing trustees could appoint new trustees.

Re Parker's Trusts ([1894] 1 Ch. 707) shows that the power here given to the surviving and continuing trustee or trustees does not enable a sole surviving trustee by his Will to exercise this power by appointing new trustees of the original trust, but it also shows that the general executors of the sole surviving trustee's Will are the personal representatives of the last surviving trustee, and can themselves appoint new trustees. This is in consonance with the principles of law as regards the chain of representation, which principles are founded on the consideration of the special confidence and actual appointment of the deceased, thus permitting an executor to transmit that power to another in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy the ultimate executor is the representative of every preceding executor (see "Williams on Executors," 9th ed., p. 204). In the case mentioned the sole surviving trustee of a Will, by his Will, appointed general executors, and also purported to appoint special executors for the purpose of executing in continuation to himself the trusts of the Will of the original testator. The general executors obtained a grant of probate of the Will of the trustee to themselves as "general executors" without any reservation of power to the special executors to come in and prove, and proceeded by deed to appoint two persons to be trustees of the Will of the original testator. Subsequently probate of the Will of the trustee limited to the trust estates of the original testator was granted to the persons named as special executors. It was held that the general executors were "the personal representatives" of the last surviving trustee within the meaning of the Act, and the deed executed by them was a valid appointment.

This Statute imposes no obligation, either on a continuing sole trustee or the personal representatives of a deceased trustee, to appoint new trustees (Peacock *v.* Colling, 33 W. R. 528; *in re* Sarah Knight's Will, 26 Ch. D. 82).

But such personal representatives must not be vexatious in their conduct, or take such a line as to necessitate costly proceedings to the trust estate; if they do they run the risk of being mulcted in the costs (see Sarah Knight's Will, *supra*).

It is further to be noticed that the Court has no jurisdiction to appoint new trustees where the sole survivor is himself desirous of appointing new trustees, even if the application be supported by a majority of the beneficiaries and the sole surviving trustee has no beneficial interest (*re* Higginbottom [1892], 3 Ch. 132). This case was a decision on Section 31 of The Conveyancing Act, 1881, but as that Section is replaced by this Section of the present Act the same construction would apply.

(iii.) *The Personal Representatives of the Last Surviving or Continuing Trustee.*

This would include the executor of such a trustee and the administrator of such a trustee who had died intestate (see *re* Shafto, 29 Ch. D. 247, and the remarks of Kekewich, J., in *re* Parker's Trusts [1894], 1 Ch. 707, at p. 721).

By empowering the appointor to appoint "*another person or other persons to be a trustee or trustees*," the Statute implies that the appointor ought not to appoint himself (see *re* Skeats's Settlement, Skeats *v.* Evans, 42 Ch. D. 522; and generally as to who should be appointed see "Lewin on Trusts," 9th edition, pp. 748-9, and notes on Section 25, *infra*).

It may be laid down that the person who exercises a power of appointing new trustees should have regard to the principles followed by the Court when appointing new trustees. It seems quite clear that the appointor should not appoint himself if he is a beneficiary: the appointment would be bad if he did; but if he is not, there is not the same objection. In any event it is the duty of the outgoing trustee to satisfy himself of the fitness of the new one. Where there is a life estate created by the trust it is improper to appoint as trustee the solicitor of the tenant for life (*re* Kemp's Settled Estates, 24 Ch. D. 485). The appointment of the solicitor of the tenant for life as trustee is not one which the Court itself would make (Earl of Stamford, Payne *v.* Stamford [1896], 1 Ch. 288).

Finally, it should be noticed that whatever the nature of the trust, whether created by instrument or not, the power of appointing new trustees must be exercised "by writing," and, though not apparently necessary, it is usual and proper that it should be by deed; but this does not enable a sole surviving trustee to exercise the power by his Will (*re* Parker's Trusts, *supra*).

Sub-section 2.—On the appointment of a new trustee for the whole or any part of the trust property—

(*a*) *The number of trustees may be increased.*

By reason of Section 1, Sub-section 1 (*b*), of The Interpretation Act, 1889 ("words in the singular shall include the plural, and words in the plural shall include the singular"), the Sub-sections (*a*), (*b*), (*c*), and (*d*) of this Sub-section apply also on the appointment of new trustees.

The power of increasing the number of trustees only arises when an appointment is being made to supply a vacancy in the trusteeship, unlike the power conferred on the Court by Section 25 of this Act, which is a re-enactment of Section 32 of The Trustee Act, 1850, and can be exercised even though there is no vacancy (*re* Gregson's Trusts, 34 Ch. D. 209; and *re* Brackenbury's Trusts, 10 Eq. 45).

(*b*) *A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.*

There have been conflicting decisions, both of puisne Courts, on the meaning of Section 5 in The Conveyancing Act, 1882, repealed by this Act, and replaced by this Sub-section; and, according to the later of these cases (Savile *v.* Couper, 36 Ch. D. 520), the Section so repealed authorised the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property. *In re* Paine's Trusts (28 Ch. D. 725) was a case under the Trustee Act, and not in point on the construction of this Section. But all doubt was set at rest by the enactment of Section 6 of The Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), which enabled trustees to be appointed for separate parts of the property, though no trustee be appointed of other parts. That Section has been repealed by this Act, and the Sub-section now under discussion replaces it.

Under the Trustee Acts separate sets of trustees have been appointed for separate trusts (*re* Cotterill's Trusts, W. N. [1869] 183; *re* Cunard's Trusts, 27 W. R. 52; and *re* Moss's Trusts, 37 Ch. D. 513).

The Section also applies to cases where the trusts of portions of the estate may be separate for a time, but eventually coalesce (*re* Hetherington's Trusts, 34 Ch. D. 211).

(*c*) *It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this Section from his trust unless there will be at least two trustees to perform the trust.*

In appointments by the Court it is clearly the practice not to discharge a trustee unless there is another appointed to take his place, except when the trust is virtually at an end. Thus, where one of three trustees is a lunatic, the Court will not appoint the other two trustees, in the place of the three, to carry out the trust (*in re* Aston, 23 Ch. D. 217; *in re* Martyn, 26 Ch. D. 745; *in re* Lamb's Trusts, 28 Ch. D. 77; Davies *v.* Hodgson, 32 Ch. D. 225;

in re Gardiner's Trusts, 33 Ch. D. 590). The Court will only deviate from this rule, and make such an appointment, if the trustees have no other duty to perform than to distribute a fund which is immediately divisible. It will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund.

(*d*) *Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees shall be executed or done.* (See Section 12, *infra.*)

If an assurance or thing requisite for vesting the trust property were not executed, the new trustees would still, it is apprehended, be the trustees, the old ones in whom the legal estate in the property remained vested being bare trustees, and liable at any moment to be called on to transfer the property to the new ones. The next Sub-section (3) makes this quite clear.

Sub-section 3.—*Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.*

This Sub-section is merely for the purpose of bridging over the period that must frequently and inevitably elapse before all the proper assurances for vesting the trust property in the new and continuing trustees have been carried through, and permits the trustees to act as though their appointments were complete, and to have all the powers and authorities of original trustees before the actual vesting has taken place.

Sub-section 4.—*The provisions of this Section relative to a trustee who is dead include the case of a person nominated trustee in a Will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this Section.*

This merely implies that, for the purpose of appointing a new trustee in the place of a dead trustee, one who dies in the lifetime of a testator comes within the Section, though in such case his personal representative could not appoint a new trustee as the personal representative of a deceased trustee (Nicholson *v.* Field [1893], 2 Ch. 511; following *re* Ambler's Trusts, 59 L. J. 210).

The case of a refusing or retiring trustee who is willing to concur in appointing a new trustee has been already dealt with under notes to (ii.) above, p. 53.

Sub-section 5.—*This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.*

A mere enumeration of certain events upon which the power is to arise does not exclude its arising on the other events mentioned in the Act (Cecil *v.* Langdon, 28 Ch. D. 1; *re* Coates and Parsons, 34 Ch. D. 370; and *re* Walker and Hughes's Contract, 24 Ch. D. 698). Nor is any contrary or other intention within the meaning of this Section expressed by the deed by reason of the power being vested in nominors (Cradock *v.* Witham, W. N. [1895] 75, where it was held that a power to nominors given in the deed had lapsed).

Sub-section 6.—*This Section applies to trusts created either before or after the commencement of this Act.* (See Section 54 of this Act.)

This will include instruments creating trusts executed even before Lord Cranworth's Act (23 & 24 Vict. c. 145).

This Section applies also for the purposes of the Settled Land Acts (see Section 47, Sub-section 1, *infra*).

See Appendix V., Forms 1 and 2.

Retirement of trustee.

11. (1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This Section applies to trusts created either before or after the commencement of this Act.

Section 11.—The powers of this Section come into play under the following conditions:—

1. There must be more than two trustees.
2. The one desiring to retire must declare by deed his desire of being discharged.
3. The co-trustees, and such other person as is empowered to appoint trustees, must consent to his discharge, and to the vesting in the co-trustees of the trust property.

This Section applies only to a case of disclaimer of trusts connected with property, and not to a mere power unconnected therewith, which is dealt with by Section 6 of The Conveyancing Act, 1882, and which permits mere powers to be disclaimed.

A trustee cannot disclaim part only of his trust. This was distinctly decided in *re* Lord and Fullerton's Contract ([1896] 1 Ch. 228). There a testator who

had real and personal property in England and the United States of America gave all his residuary real and personal estate to five trustees, of whom one was resident in the United States. The Will was proved by three of the English trustees, the fourth having disclaimed. The American trustee executed a deed by which he declared that he disclaimed the offices of trustee and executor under the Will, and all interest in and power over the real and personal estate without the bounds of the United States of America, devised and bequeathed by the Will. The English trustees sold some of the English real estate to a purchaser, who objected that the American trustee ought to join in the conveyance. It was held that the American trustee's disclaimer was void.

Sub-section 2.—This Sub-section should be read in connection with Sub-sections 2, 3, and 4 of Section 12 of this Act.

See Appendix V., Form 3, *infra.*

Vesting of trust property in new or continuing trustees.

12. (1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this Section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This Section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This Section applies only to deeds executed after the Thirty-first of December, One thousand eight hundred and eighty-one.

Section 12, *Sub-section* 1.—This simple and effective method of vesting the trust property was legislatively enacted by Section 34 of The Conveyancing Act, 1881. That Section is now repealed, and is replaced by this Section. The subject matter of the trust which can be so vested must be—

1. Any estate or interest in any land.
2. Any estate or interest in any chattel.
3. The right to recover and receive any debt or other thing in action.

Equitable interests need no vesting declaration: the appointment of new trustees itself vests them.

But this Section does not include (see Sub-section 3)—

1. Any legal estate or interest in copyhold or customary land.
2. Land conveyed by way of mortgage.
3. Any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner directed by or under Act of Parliament.

"Land" is defined in this Act to include manors, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (see Section 50).

It is to be remarked that the vesting declarations must be in the same document as the appointment of new trustees, and that the document must be a deed. See Appendix V., Form 4, *infra*.

As to stamping such a deed, Hadgett *v.* Commissioners of Inland Revenue (3 Ex. D. 46) shows that such a document will have to be stamped as an appointment, and also as containing a vesting order.

"*The persons who by virtue of the deed become and are the trustees for performing the trust.*"—These persons are, of course, the continuing trustees and the new trustee, or the new trustees alone if the former trustees have all died or retired.

Sub-section 3.—The first clause of this Sub-section has in view the protection of the rights of the lord of the manor wherein any copyhold property belonging to the trust is situate. The lord having usually the right to some fee on the admission of a new tenant, this right is preserved by the Section, which does not render unnecessary the usual surrender and admission. In cases, then, where there is copyhold property comprised in a trust, it may be necessary to take out a summons for a vesting order of the property, and then to get admission in the

usual and recognised manner. Indeed in cases where the trust property comprises any of the items mentioned in this Sub-section, it may be advisable to apply to the Court to appoint trustees and make a vesting order at the same time. There is ample power, however, for the Court to make a vesting order where trustees have been appointed (see *infra*, p. 118). For Form of Summons for Vesting Copyhold Property see Appendix V., Forms Nos. 5 and 6, *infra*.

"*Land conveyed by way of mortgage.*"—This exception was doubtless inserted to prevent the trusts appearing on the title to the mortgaged land: a transfer, or, if not obtainable, a vesting order as above, will in such cases be necessary (Harrison's Settlement, W. N. [1883] 31; see also London and County Banking Co. *v.* Goddard, W. N. [1897] 18).

"*Any such share,*" &c., is intended to preserve the statutory mode of transfer indicated in the Companies Acts or other Statutes under which any company is incorporated, and which usually incorporate the Companies' Clauses Acts, and according to which such share, stock, annuity, or other property will have to be transferred. The course usually adopted with regard to shares standing in the books of a company in the names of the trustees is as follows:—Assuming that A. and B. are the trustees, and that B. dies, then A., the survivor, executes transfers for a nominal consideration, transferring the shares to himself and C., the new trustees: the transfers are sent to the respective companies accompanied by the certificate of death of the deceased trustee as proof, or such other reasonable evidence of death as the company may require, and the shares are registered in the names of A. and C. If a surviving trustee have died, and new trustees be appointed, then transfers are executed by the executors or administrators of the last deceased trustee transferring the shares to the new trustees, and these transfers, together with the probate of the Will or the grant of administration or such other similar evidence as above mentioned, are sent to the companies, and the shares are registered by them in the names of the new trustees. It may here be noted that English companies will never permit notices of trusts to be inscribed on their registers, so that where two or more persons are trustees they will appear on the register of an English company as joint holders, and the survivors or survivor will be entitled (as trustees) to the shares. In Scotch companies the case is different. It is necessary in such cases—*i.e.* where shares are held in such companies by two or more persons as trustees—to insert after their names on the register "as trustees." In that event when one or more die, the shares will vest in the survivors or survivor. If those words are omitted, the interest of the deceased trustee will go to his heirs according to Scotch law, and trouble may be experienced in revesting the property in the new trustees.

Sub-section 4.—This Sub-section is inserted with a view of applying the Registration Acts (7 Anne c. 20, &c.), which provide that one of the grantors or grantees must make the memorial of the deed to be registered. The person "making the declaration"—*i.e.* of vesting under Sub-section 2—is, therefore, by virtue of this Sub-section to be deemed a grantor, and can therefore make such memorial.

Sub-section 5.—This Sub-section merely states that vesting declarations, such as are above referred to, can only be effectively included in deeds executed after 31st December, 1881.

If one new and sole trustee is to be appointed in place of one or more old trustees, this Section would appear to cover it, since by The Interpretation Act, 1889 (52 & 53 Vict. c. 63, Section 1), the singular includes the plural, and *vice versâ*, unless a contrary intention appears.

As to the costs relating to the appointment of new trustees see Harvey *v.* Olliver (W. N. [1887] 149). In that case the following costs were allowed out of the property:—(1) Costs of the former trustees, payment of which was demanded by the legal personal representative of the survivor of such trustees previously to his transferring the trust property; (2) Costs incurred by the defendants previously to their appointment in obtaining a statement of the trust property and ascertaining that the power of appointing new trustees was being properly exercised; (3) Costs incurred in reference to the appointment of new trustees by the donee of the power of appointment.

Purchase and Sale.

Power of trustee for sale to sell by auction, &c.

13. (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) This Section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3) This Section applies only to a trust or power created by an instrument coming into operation after the Thirty-first of December, One thousand eight hundred and eighty-one.

Section 13.—This Section is merely a re-enactment of Section 35 of 44 & 45 Vict. c. 41, which gave statutory force to the common form provisions of a power of sale or trust for sale.

A *trust for sale* and a *power of sale* differ in the following ways:—

(i.) A power of sale does not operate as a conversion of the property over which it is given until it is exercised, while a trust does so from its creation.

(ii.) Powers are strictly construed, and can only be exercised by the persons who are, either expressly or by reference, designated as donees of the powers.

(iii.) A power to two or more will not survive without express words or necessary implication, whereas the survivor of trustees can execute a trust.

The trust for or power of sale may be either express or constructive. Constructive powers of sale arise most frequently in the case of executors; and as "trustee" includes executor, the Section under discussion applies to executors selling under an implied or express power of sale.

The rules governing the power of executors to sell lands may shortly be stated as follows:—

(i.) A devise that lands shall be sold by the executors gives them a power of sale.

(ii.) If the proceeds of sale are to be distributed for purposes which executors can alone perform there is an implied power of sale.

(iii.) The blending of realty and personalty in one fund has been held a sufficient indication to imply a power of sale.

(iv.) A charge of debts gives a power of sale to executors, and under 22 & 23 Vict. c. 35, Sections 14, 15, and 16, they can convey the legal estate.

Executors also have full and unrestricted power to sell the chattels of their testator.

Under this Section, wherever there is a *trust for sale* or a *power of sale* (as to which see below) created since 31st December, 1881—

1. The trustees may sell (*a*) all or (*b*) any part of the property;
2. The trustees may concur with any other person in selling (*a*) all or (*b*) any part of the property;
3. Subject or not to prior charges;
4. Together or in lots;
5. By public auction or private contract;
6. Subject to any conditions the trustees think fit;
7. With power to vary or rescind the contract;
8. Unless there be any contrary intention expressed in the instrument.

1. *The Trustees may Sell* (A) *All or* (B) *Any Part of the Property.*

The leading general principles which should guide a trustee in exercising a power of sale, or carrying out a trust for sale, may be shortly stated.

A trustee cannot, after the institution of a suit to administer the trusts of which he is a trustee, and to which suit he is a party, enter into a contract for sale without the consent of the Court; but in the case of executors their power to sell seems unaffected until decree (Reeves *v.* Burrage, 14 Q. B. 504).

If the *cestui que trustent* are all *sui juris* they can agree to extinguish the power of sale (*re* Palmer's Will, L. R., 13 Eq. 408; *re* Hirst's Mortgage, 45 Ch. D. 263; *re* Wadsworth, W. N. [1890] 143).

The trustee must consider primarily the interests of his *cestui que trustent*, particularly when there are successive interests.

The Court will not enforce, at the instance of a purchaser, a contract which is a clear breach of trust, and will, even where a clear breach of trust is contemplated, restrain a sale by a fiduciary vendor (Oceanic Steam Navigation Co. *v.* Sutherberry, 16 Ch. D. 236; Wood *v.* Richardson, 4 Beav. 176).

Subject to any time being fixed by the instrument creating the trust, a trustee should sell with all convenient speed, but even if the time expire the power of sale is still exerciseable.

A trustee for sale ought not to sell after the beneficiary has obtained full age, or where the objects of the trust have been fulfilled, but if there are more beneficiaries, any of them can require that the trust for sale shall be carried out (Biggs *v.* Peacock, 22 Ch. D. 284; *re* Tweedie and Miles, 27 Ch. D. 315).

A trustee should inform himself of the value of his trust estate by valuation or otherwise. Partly for this reason an option of purchase of the trust estate cannot be given (Oceanic Steam Navigation Co. *v.* Sutherberry, 16 Ch. D. 236). This rule is based on the principle that it is the trustee's duty to consider *at the time of sale* all the circumstances bearing on the value, which is obviously impossible where an option subsequently operating is given.

It appears to be law that a trust for sale does not authorise a mortgage (Stroughill *v.* Anstey, 1 De G. M. & G. 645). But, on the other hand, since the Conveyancing Act a power to mortgage virtually includes the right of giving a power of sale.

The effect of *re* Frith and Osborne (3 Ch. D. 618) is that trustees with a power of sale can, under it, agree to make a partition.

Notwithstanding that the Section says the trustees may sell "*all or any part of the property*," the estate cannot be sold separate from the timber on it, even though the tenant for life may be without impeachment of waste; but such a sale may be sanctioned under 22 & 23 Vict. c. 35, Section 13 (Cholmeley *v.* Paxton, 3 Bing. 207; 5 Bing. 48; 3 Russ. 565, where a sale was set aside after half a century on account of a separation of the timber and the land), or under The Settled Land Act, 1882 (45 & 46 Vict. c. 38),

Section 35. The Act 22 & 23 Vict. c. 35 permits a confirmation of such a sale where a *bonâ fide* sale has been made, and by mistake a portion of the purchase money has been paid to the tenant for life or others as the value of the timber or other articles.

The same rule applies to selling the minerals apart from the surface, and it was so decided in Buckley *v.* Howell (29 Beav. 546). But 25 & 26 Vict. c. 108 enables trustees and "*other persons*"—*i.e.* mortgagees (*re* Beaumont's Mortgage Trusts, L. R., 12 Eq. 86; *re* Wilkinson's Mortgaged Estates L. R., 13 Eq. 634)—with the previous sanction of the Court, to sell the surface separate from the land. That Act is now repealed by Section 51 of the present Act; but, since "trust" is defined as not including the duties incident to an estate conveyed by way of mortgage, it seemed open to doubt whether mortgagees could exercise this power, even with the sanction of the Court. To clear up this doubt Section 3 of The Trustee Act, 1893, Amendment Act, 1894, enacted that the words "or other person" should be inserted in Section 44 of this Act (The Trustee Act, 1893). The effect of this is to enable mortgagees still to exercise this power. A sale or lease of lands under The Settled Land Act, 1882, may be made of the land and minerals separately (see Settled Land Act, 45 & 46 Vict. c. 38, Sections 6 and 17, and also The Settled Land Act, 1890, 53 & 54 Vict. c. 69, Section 8). As to application to the Court under Section 44, which replaces 25 & 26 Vict. c. 108, see notes to Section 44, *infra*, p. 140.

Where the power of sale is to be exercised "*at the request and by the direction of*" the tenant for life or other person, that request and direction must be obtained, since by Sub-section 2 of this Section the power of sale "shall have effect subject to the terms of the instrument creating the trust or power and to the provisions therein contained." But it is not necessary for the consent to be obtained before the contract for sale. It is sufficient if it be obtained before conveyance (Sykes *v.* Sheard, 33 Beav. 114). The Court will not enforce specific performance of a contract requiring such consent if it have not been obtained (Phillips *v.* Edwards, 33 Beav. 440).

2. *Trustees may Concur with any other person in Selling* (A) *All or* (B) *Any Part of the Property.*

Trustees for sale of an aliquot part of an estate could, even before the Conveyancing Act, join in a sale of the whole estate (Cavendish *v.* Cavendish, 10 Ch. D. 319); but the Section now being discussed clears up any doubt on the subject, and gives trustees a wide discretion as to the mode of sale under such circumstances. The power of sale of an *aliquot part* does not imply a power of leasing (Evans *v.* Jackson, 8 Sim. 217; and Micholls *v.* Corbett, 34 Beav. 376).

3. *Subject or Not to Prior Charges.*

The trustee may sell merely the equity of redemption—*i.e.* subject to the charges or free from the charges—if the mortgagees will concur and be paid off (Manser *v.* Dix, 8 De G. M. & G. 703).

4. *Together or in Lots.*

Whether the property should be disposed of in lots is a question to be decided by the trustees when contemplating a sale, who should seek advice from a competent auctioneer. Expenses properly incurred in so doing will be allowed out of the trust property.

5. *By Public Auction or Private Contract.*

As to the considerations which should guide trustees in choosing the mode of sale, the following cases are useful:—*Ex parte* Dunman (2 Rose 66), *ex parte* Hurly (2 D. & C. 631), *ex parte* Ladbroke (1 Mont. & M'A., 384), Davey *v.* Durrant (1 De G. & J. 535).

A trustee cannot delegate the power of sale (Hardwick *v.* Mynd, 1 Anst. 109). He must appoint the valuer (Fry *v.* Tapson, 28 Ch. D. 268), receive the purchase money, and advertise the property if the sale is to be by public auction. He must also see that proper arrangements are made for selling, as by advertisement and due notice of the sale, and if proper arrangements are not made an injunction can be issued at the instance of the beneficiaries.

But this rule must not be taken as preventing—

(i.) The performance of merely formal acts by attorney by the trustee: thus the execution of a conveyance in pursuance of a sale decided upon by the trustee (see *per* Lindley, L. J., *re* Hetling and Merton's Contract [1893], 3 Ch. 269, at p. 280). What cannot be delegated is the exercise of a discretion which the personal confidence reposed in him, implied by his being a trustee, prevents any other person from exercising. Where the act to be performed is the execution of a conveyance or other document, it is wise to provide in the conditions of sale (if any) that no objection shall be taken on the ground that the deed will be executed by attorney.

(ii.) Where in the usual course of business acts are done by an agent, trustees are also entitled to employ and act by agents without incurring responsibility for their deeds, provided they (the trustees) have exercised due care in choosing such agents. Thus a trustee may transmit money payable at a distance through a bank; or a trustee investing trust funds may employ a broker to procure securities authorised by the trust, and may pay the purchase money to the broker (Speight *v.* Gaunt, 9 App. Cas. 1).

If the property is sold by auction, the trustees must not permit the deposit to remain unnecessarily in the hands of the auctioneer whom they have employed (Edmonds *v.* Peake, 7 Beav. 239).

6. *Subject to any Conditions the Trustees think fit.*

This Section should be considered in connection with Sections 14 and 15 of this Act, which prevent a sale to a *bonâ fide* purchaser being impeached,

and see the following cases:—Hobson *v.* Bell (2 Beav. 17), Wilkins *v.* Fry (2 Rose 375), Rede *v.* Oakes (4 De G. J. & S. 505), Dance *v.* Goldingham (L. R., 8 Ch. 902), Dunn *v.* Flood (25 Ch. D. 629), Falkner *v.* Equitable Reversionary Society (4 Drew. 352).

7. With Power to Vary or Rescind.

The power of rescission, which is now usually retained by the vendors by means of a condition enabling them to rescind if unwilling or unable to comply with objections or requisitions, is a proper one to be inserted in conditions even on a sale by trustees (see also Sections 14 and 15 of this Act, and Noble *v.* Edwards, 5 Ch. D. 378).

The conditions must be carefully framed, for the trustee must take care on the one hand that they are not unduly depreciatory, so as to affect the sale, and on the other hand that they are not such as to unnecessarily diminish the amount properly obtainable for the beneficiaries as the price of the property.

Power to sell subject to depreciatory conditions.

14. (1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This Section applies only to sales made after the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

Section 14, *Sub-section* 1.—By the rules of equity, independently of any enactment, a trustee for sale would, it is apprehended, be justified in resorting to special stipulations if the state of the title and the circumstances of the

sale require it, and the stipulations are reasonable and such as a provident owner would employ in the case of a sale of his own property (Ord *v.* Noel, 5 Mad. 438). However, prior to the enactments after mentioned, it was generally the practice to insert in the instrument containing the trust for or power of sale authority for the trustees to sell under special conditions.

By Section 2 of Lord Cranworth's Act (23 & 24 Vict. c. 145), where the trust instrument was executed after the passing of the Act (the 28th of August, 1860), and such instrument contained no declaration of a contrary intention, trustees for sale were authorised to insert in any conditions of sale or contract such special conditions of sale as to title or evidence of title or otherwise as they might think fit. By Section 13 of this Act, which replaces Section 35 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which repealed Lord Cranworth's Act (but not so as to affect the operation of instruments executed before the commencement of the repealing Act), it is provided that trustees for sale, where the instrument creating the trust for or power of sale comes into operation after the 31st of December, 1881, and does not express a contrary intention of making other provision, may sell, or concur with any other person in selling, subject to any such conditions respecting title or evidence of title or other matters as they think fit.

Neither the authority usually contained in instruments creating trusts for sale, nor that conferred by Section 13 of this Act, would, however, justify a trustee in using special conditions which are not rendered actually necessary by the state of the title or the circumstances under which the sale is made, and which might depreciate the sale (Dance *v.* Goldingham, L. R., 8 Ch. 909, 910; and Dunn *v.* Flood, 28 Ch. D. 591). A mere desire to save expense in regard to the sale is no sufficient reason for the employment of conditions having a depreciatory effect. Thus a condition limiting the commencement of title to the trust instrument itself, and stipulating that no earlier title should be called for except at the purchaser's expense (Dance *v.* Goldingham, L. R., 8 Ch. 902); a condition making an instrument of recent date the root of title where there was nothing on the title rendering such limitation necessary; a condition that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated, where apparently there would have been no difficulty in proving the title; and a condition that the sale was made subject to the existing tenancies, restrictive covenants, and other incidents of tenure, and there were no such tenancies, covenants, or incidents of tenure, have been held to be improper (Dunn *v.* Flood, 25 Ch. D. 629; 28 Ch. D. 586). On the other hand, a condition limiting the title to ten years where the property had been plotted out for building purposes, and was offered for sale in numerous small lots, and to have furnished the earlier title to the purchaser of each lot would have put the estate to very great expense, was held to be proper under the circumstances (Dunn *v.* Flood, 28 Ch. D. 586). Probably trustees are always justified in the user of conditions depreciatory in a sense, but beneficial on the whole, and such as a prudent owner would resort to: for example, a condition enabling the vendor to rescind if unwilling

to comply with the purchaser's requisitions, or a condition casting the expense of the production of documents, or of procuring evidence, upon the purchaser (Falkner *v.* Equitable Reversionary Society, 4 Drew. 352; Hobson *v.* Bell, 2 Beav. 17).

Courts of Equity apparently, in deciding whether relief should be given to the *cestui que trust*, or, where action was taken by the trustee or the purchaser, specific performance of the sale enforced, have hitherto thought it sufficient to inquire whether the conditions were calculated to depreciate the sale, and if there were reasonable and proper grounds for their introduction, and have always declined to inquire whether there was an actual depreciation, as being a question impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by the conditions from attending or bidding at the sale (Dance *v.* Goldingham, L. R., 8 Ch. 902, 911). Henceforth, however, it will not be sufficient to show that the conditions were of a nature to depreciate the sale, but it must also be shown that the price obtained was not the full value of the property, and that the inadequacy was actually caused through the user of the alleged depreciatory conditions.

Sub-section 2.—Hitherto, where on a sale by trustees depreciatory conditions have been employed, the *cestui que trust* could either have prevented the sale from being completed, or have impeached the purchaser's title after completion (Rede *v.* Oakes, 4 De G. J. & S. 513; Dance *v.* Goldingham, L. R., 8 Ch. 902). But since the passing of this Act no sale will be impeachable after the conveyance to the purchaser has been executed on the ground that such sale was made under conditions which affected the adequacy of the price obtained, save in the case of collusion between the trustee and the purchaser. However, although where the depreciatory conditions have been employed the sale will not be impeachable against a *bonâ fide* purchaser after conveyance, there is nothing in the Act to debar the *cestui que trust* from making the trustee personally liable for the amount of the inadequacy caused thereby.

Sub-section 3.—As a sale by trustees subject to conditions which, under the circumstances, are unnecessarily depreciatory in their nature is a breach of trust, the purchaser might have declined to complete, and, on the other hand, he could not have enforced the sale against the trustees (Dance *v.* Goldingham, L. R., 8 Ch. 911). The purchaser's right to object on the ground of the unnecessary user of depreciatory conditions is now taken away.

Sub-section 4.—This Section is to apply only to sales made after the 24th of December, 1888, which, it is conceived, means only to cases where the contract for sale was entered into after that date.

Power to sell under 37 & 38 Vict. c. 78.

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of Section Two of The Vendor and Purchaser Act, 1874.

Section 15.—This is a re-enactment of Section 3 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), that Section being repealed for the purpose of consolidation (see Section 51 and Schedule).

Section 2 of The Vendor and Purchaser Act, 1874, is in the following terms:—

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules: that is to say—

First.—Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Second.—Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

Third.—The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth.—Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth.—Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

The "contract" referred to in the above-mentioned Section of The Vendor and Purchaser Act, 1874, is a "contract of sale of land" (see Section 1 of that Act).

"*A trustee who is a purchaser.*"—This refers to a trustee who is purchasing property to be held as trust property. It does not refer to the case of a trustee who attempts himself to purchase property belonging to the trust. The strict rule of equity is that a trustee cannot purchase trust property, for he may thereby be using knowledge to his own behoof which he has acquired for the benefit of his *cestui que trustent*. A purchase by a trustee of trust property for himself, and whether directly or indirectly through an agent, will be set aside by the Court at the instance of the beneficiaries. The only way in which a trustee can become a purchaser of trust property is by divesting

himself of his character of trustee, putting himself at arm's length, as it is phrased, with his beneficiaries, concealing from them no fact within his knowledge as to the trust property, and coming forward on the footing of an ordinary purchaser.

Married woman as bare trustee may convey.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a feme sole.

Section 16.—This is a re-enactment of Section 6 of The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), that Section being repealed by the present Act for the purpose of consolidation (see Section 51 and the Schedule).

The expression "bare trustee" is one which has given rise to considerable discussion. It is to be remarked that, according to the definition of a "trust" in Section 50 of this Act, it includes "cases where the trustee has a beneficial interest in the trust property." It was held in *re* Docwra, Docwra *v.* Faith (29 Ch. D. 693), that a married woman being a trustee for sale, although she had a beneficial interest in the proceeds of sale, was a bare trustee within the meaning of the Section which this one replaces, where the sale was under the order of the Court (see The Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, Sections 1 and 18). Stirling, J., in *re* Cunningham and Frayling ([1891] 2 Ch. 570), preferred the definition of Hall, V.-C., in Christie *v.* Ovington, (1 Ch. D. at p. 281), to that given by Jessel, M. R., in Morgan *v.* Swansea Urban Sanitary Authority (9 Ch. D. 582). According to Hall, V.-C., a trustee who has active duties to perform, although he has no beneficial interest in the trust property, is not a "bare trustee"; or, putting it conversely, a trustee who has no active duties to perform, even though he has a beneficial interest in the property, is a "bare trustee." It seems clear from *re* Harkness and Allsopp's Contract ([1896] 2 Ch. 358) that The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, Sections 1, 18, and 24), does not enable a woman married since the commencement of the Act, being a trustee for sale of real estate, to convey to a purchaser, except with the concurrence of her husband and by a deed acknowledged by her. This, then, is the law when a *feme coverte* trustee has what may be called an active power or trust for sale, and is not a "bare trustee" within the meaning of this Section.

Various Powers and Liabilities.

Power to authorise receipt of money by banker or solicitor.

17. (1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the

custody of, and to produce, a deed containing any such receipt as is referred to in Section Fifty-six of The Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said Section as if the person appointing the solicitor had not been a trustee. 44 & 45 Vict. c. 41.

(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3) Nothing in this Section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4) This Section applies only where the money or valuable consideration or property is received after the Twenty-fourth day of December, One thousand eight hundred and eighty-eight.

(5) Nothing in this Section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

Section 17, *Sub-section* 1.—This Section replaces Section 2 of The Trustee Act, 1888, which made an important alteration in the law as laid down in the cases of *re* Bellamy and Metropolitan Board of Works (24 Ch. D. 387),

and *re* C. Flower and Metropolitan Board of Works (27 Ch. D. 592). They established the rule that unless there is an express power for the purpose, or (to use the expression of Bowen, L. J., in the former case: see 24 Ch. D. 404) a moral necessity (as to which see *ex parte* Belchier, Amb. 218), to employ a solicitor to receive the purchase money, trustees may not receive trust money through their solicitor, even in the ordinary course of business, though where, in the ordinary course of business, they employ a broker or mercantile agent they may receive trust money through such broker or mercantile agent (*ex parte* Belchier, *ubi supra*; Speight *v.* Gaunt, 9 App. Cas. 1). So, too, a trustee may collect rents by an agent paid by commission, and may employ a bailiff to manage an estate, or an accountant to get out and arrange trust accounts. By Section 56 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it was enacted that "where a solicitor produces a deed, having in the body thereof or endorsed thereon a receipt for consideration money or other consideration, the deed being executed or the endorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

This Section of the Conveyancing Act did away in ordinary cases with the necessity of the solicitor producing a written authority expressly authorising him to receive the purchase money or other consideration (Viney *v.* Chaplin, 2 De G. & J. 482; *ex parte* Swinbanks, *in re* Shanks, 11 Ch. D. 525); but the cases above quoted decided in effect that trustees purchasing were not within the Section, so that where the trustees could not, from special circumstances (*re* Bellamy and Metropolitan Board of Works, 24 Ch. D. 387: see *per* Cotton, L. J., at p. 400), personally receive the money, they had still to give their solicitor a written authorisation so to do. This defect was remedied by Section 2 of The Trustee Act, 1888, now replaced by Section 17 of this Act; and the production of a deed having in the body thereof or endorsed thereon a receipt for consideration money or other consideration, the deed being executed or the endorsed receipt being signed by the person entitled to give a receipt for that consideration, will now in all cases be a sufficient authority to the person liable to pay the solicitor, and will also do away with the necessity for a separate written authority. It has been held in Day *v.* Woolwich Equitable Building Society (40 Ch. D. 491) that the solicitor must be acting for the person entitled to give the receipt, and actually "*produce*" the deed with the receipt in it. In this case it was held that it is not sufficient that the solicitor has the deed in his office. The effect of the Section, in fact, is to enable a purchaser or other person to deal with the solicitor "just as though he had a power of attorney from his clients enabling him to receive the money" (*per* Kay, J., *in re* Bellamy and Metropolitan Board of Works, 24 Ch. D. 390). When a vendor has paid upon the production of such a deed he is exonerated from further liability, even if the solicitor should make away with the money. The trustee, however, who has authorised the receipt

in this manner, will only be protected where the money or valuable consideration has been in the hands or under the control of the solicitor no longer than would be reasonably necessary to enable the solicitor to pay or transfer it to the trustee. What this period is must, of course, depend on the circumstances of each case (see note to Sub-section 3, *infra*).

The meaning of the whole Section has been very fully discussed in *re* Hetling and Merton's Contract ([1893] 3 Ch. 269). The actual decision in that case was that a general power of attorney given by a trustee, authorising the attorney to execute deeds and transfer property, does not authorise the attorney to execute a deed and give a receipt for the purchase money within the meaning of this Section. The argument put forward was that the production of a deed executed by the trustee's attorney, and sufficient in other respects, implies an authority to the attorney to receive the money. On this, Lindley, L. J. (see p. 280), remarks: "The solicitor to receive the money under Section 2 of The Trustee Act, 1888 [replaced by this Section], must be appointed by the trustee himself. The trustee must himself permit the production by the solicitor of a deed with a proper receipt clause, in order that such production may have the effect mentioned in the Section." It follows from this that if a purchaser were to pay money to a solicitor producing a deed duly executed by a trustee with a proper receipt clause, and it turned out that the solicitor had stolen the deed, or had not been permitted by the trustee to have the custody of it and to produce it, the purchaser would not be protected by the Section. At the same time, ordinary business transactions cannot be carried on without some amount of trust; and if a purchaser in an ordinary case were, without reason, to require proof that a solicitor purporting to act for trustees, and producing a proper deed, had their permission to have the custody of and to produce it, the purchaser would, *primâ facie*, be acting unreasonably, and would probably have to pay for his excess of caution.

Where the trustees have a banking account and the consideration is cash, the solicitor should pay the money in the same, or, at the latest, the following day.

The Section does not make any alteration in the law as to trustees permitting one of themselves to receive the money: this is illegal (*re* C. Flower and Metropolitan Board of Works, 27 Ch. D. 592).

The words of the Section are wide, and comprise not only money, but "*any valuable consideration or property*."

Sub-section 2.—By this Sub-section a trustee is authorised to appoint a banker or solicitor to receive money due upon a policy of assurance, a power not hitherto possessed unless given expressly by the instrument creating the trust (see the cases cited in the note to Sub-section 1, above). This Sub-section differs somewhat in its wording from Sub-section 1, but as it authorises a trustee to appoint a banker or solicitor to be his agent "*to receive and give a discharge*" for any money payable to him under a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by the trustee, an assurance society paying an agent so appointed would doubtless be discharged and freed from further liability.

Sub-section 3.—The period of time during which money, valuable consideration, or other property may be allowed to remain "in the hands or under the control of the banker or solicitor" must depend on the circumstances of each case, subject to the restriction that it must not be "*longer than is reasonably necessary to enable the banker or solicitor to pay or transfer the same to the trustee.*" Trustees should therefore not permit moneys to remain in the custody of their banker any longer than is absolutely necessary to seek a proper investment. In Cann *v.* Cann (33 W. R. 40) fourteen months was held too long a period, and in *re* Jones, Jones *v.* Searle (49 L. T., N. S. 91), trustees were charged interest on moneys they had mixed with their own, and left with their bankers (see also notes to Section 24, *infra*, and Dewar *v.* Brooke, 33 W. R. 497).

Sub-section 4.—It is to be noted that this Section only applies where the money, valuable consideration, or other property is to be received after the 24th of December, 1888, which would, of course, include any cases where the contract for sale was made before, but the purchase not completed until after, that date.

The creator of the trust can alter the conditions in this Section laid down as he thinks fit; but, if well advised, no person creating a trust will do so. The difficulties, both practical and legal, of a trustee's position are such that it is not advisable to depart from the general rules here laid down for facilitating dealings with trust property.

Power to insure building.

18. (1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This Section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3) This Section applies to trusts created either before or after the commencement of this Act, but nothing in this Section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Section 18.—Before the passing of The Trustee Act, 1888 (Section 7 of which is replaced by this Section), the law as to the duty of executors and trustees to insure against fire property vested in them was to be gathered from the cases of Bailey *v.* Gould (4 Y. & C. 221) and Fry *v.* Fry (27 Beav. 146), and may be shortly stated as follows:—

(*a*) An executor is not liable for the loss of property by accidental fire, and is not bound either to insure or to continue the insurance if one has been effected by the testator. In Bailey *v.* Gould (*ubi supra*) the policy had expired previously to the testator's death. In Fry *v.* Fry (*ubi supra*) the testator as a lessee was bound to insure. The insurance expired on the 25th of March, and the testator died on the 27th, without having paid the premium. The premium was not paid by the executors, and the house was burnt down on the 26th of May. In neither of these cases were the executors (in Fry *v.* Fry they were also trustees) held liable, but a payment made by the executors in the latter case, in part discharge of the testator's covenant to insure to the amount of £300, was allowed, indicating that had the executors insured they would have been quite justified in so doing, and that no exception could have been taken to that course.

(*b*) The position of a trustee is slightly different from that of an executor. He may in his discretion insure the property, but should obtain the consent of the person or persons entitled to the income before doing so (see "Lewin on the Law of Trusts," 9th edition, p. 649).

Thus it will be seen that the law as it stood before The Trustee Act, 1888, placed executors and trustees in a difficult position as regards insuring buildings and property against fire: for, on the one hand, if they omitted to continue or renew a policy of insurance serious loss might be occasioned to the trust estate, while, on the other hand, if they did insure, the beneficiaries interested might raise objections. Moreover, in the case of trustees at least, persons entitled to the income might have to be consulted before the insurance could properly be effected. In the memorandum originally issued with the Bill for The Trustee Act, 1888, the object of the Section now under discussion was said to be to remove a doubt now existing in the profession whether a trustee could insist on having trust property insured at the expense of the tenant for life, but, as the definition in Section 50 includes an executor or administrator as well as a trustee in the ordinary sense, this Section clearly applies to all these persons.

The Section, however, removes all difficulties, leaving it entirely in the discretion of the executor or trustee to insure or not as he thinks fit, without the necessity of consulting anyone interested in the income. The result in the case of a tenant for life will be that the trustee, if he insures, can throw the expense on him. The insurance is not to exceed three-fourths

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(3) This Section applies to trusts created either before or after the commencement of this Act, but nothing in this Section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Section 19, *Sub-section* 1.—Prior to the passing of the Act 23 & 24 Vict. c. 145 (28th August, 1860), in the absence of a direction, either expressed or implied, in that behalf, a trustee of renewable leaseholds was not bound to renew (O'Ferrall *v.* O'Ferrall, Lloyd & G., *temp.* Plunket, 79). If, however, in such a case the trustee did renew, the renewed lease, although taken by him in his own name or in that of some person acting on his behalf, became subject to the trusts declared of the original term, the trustee having a lien on the estate for the expenses of the renewal, with interest, and a right to be indemnified by the persons beneficially interested against any personal covenants which he may have entered into with the lessor (Keech *v.* Sandford, Sel. Ch. Ca. 61; Pickering *v.* Vowles, 1 Bro. C. C. 197; Giddings *v.* Giddings, 3 Russ. 241).

By Section 8 of 23 & 24 Vict. c. 145, it is provided that "It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this Section is not to apply to any case where by the terms of the settlement or Will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expenses of renewing the same."

And by Section 9 of the same Act it is provided that "In case any money shall be required for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands comprised in the renewed lease; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are

herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted for the purposes aforesaid."

The provisions of the above-mentioned Sections of 23 & 24 Vict. c. 145 were restricted to persons acting under a deed, will, codicil, or other instrument executed after the passing of that Act, or under a will or codicil confirmed or revived by a codicil executed after that date (see Section 34).

Part I. of 23 & 24 Vict. c. 145, including Sections 8 and 9, was repealed by Section 64 of The Settled Land Act, 1882 (45 & 46 Vict. c. 38), which, however, declares that the repeal by that Act of any enactment shall not affect any right accrued or obligation incurred before the commencement of that Act (the 31st of December, 1882), nor shall the same affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made before the commencement of that Act.

Section 19 of this Act is, it will be seen, a re-enactment of Section 8 of 23 & 24 Vict. c. 145 (the two Sections being almost identical in their terms), and of part of Section 9 of that Act, and also of Sections 10 and 11 of The Trustee Act, 1888. The new provision, however, is not restricted in its effect to trust instruments executed or made after any particular time, but extends to all trust instruments comprising renewable leaseholds, without reference to date (see Sub-section 2 of this Section). The last words of Sub-section 1—"*unless the consent in writing of that person is obtained to the renewal on the part of the trustee*"—were not contained in Section 8 of 23 & 24 Vict. c. 145. Their effect is to give a limited owner a right to assent to a renewal.

Sub-section 2.—It will be observed that although this Sub-section provides for the raising of money required to meet the expenses of renewal by mortgage of the hereditaments for the time being, subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject, somewhat after the manner of Section 9 of 23 & 24 Vict. c. 145, it does not, like that Act, contain an express power to convey the hereditaments to be mortgaged, and cases may therefore arise where a trustee desirous of raising money for the purpose of renewal will find it difficult to give a security effectual at law as well as in equity.

If, prior to the Act 23 & 24 Vict. c. 145 coming into effect, the trust instrument directed a renewal, but omitted to point out how the necessary expenses were to be levied, the duty of the trustee, unless the persons beneficially interested consented to advance the money required, would have been to raise the fine and other costs of renewal by a mortgage of the renewed term, that being the course which the Court of Chancery always directed to be adopted when the question was brought before it (Buckeridge *v.* Ingram, 2 Ves. 666; Earl of Shaftesbury *v.* Duke of Marlborough, 2 My. & K. 121; Allan *v.* Backhouse, 2 Ves. & Bea. 72, 79).

A recent case throws considerable light on the question as to how the expenses of renewal should, in the absence of any indication in the settlement or Will, be borne as between tenant for life and remaindermen. The case is

that of *re* Baring, Jeune *v.* Baring ([1893] 1 Ch. 61), which decides that the fine and attendant expenses ought to be distributed among the beneficiaries according to their enjoyment of the property, which enjoyment may properly be ascertained by actuarial valuation. The case is also a decision that the Sections of this Act now under discussion, re-enacting as they do Sections 10 and 11 of The Trustee Act, 1888, do not alter the law as between tenant for life and remaindermen on the point in question, and only deal with the liability of the trustees. This decision practically followed that in Nightingale *v.* Lawson (1 Bro. C. C. 440).

Power of trustee to give receipts.

20. (1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This Section applies to trusts created either before or after the commencement of this Act.

Section 20.—This is in effect a re-enactment of Section 36 of The Conveyancing and Law of Property Act, 1881, that Section being repealed by the present Act for the purpose of consolidation.

It will be observed that this Section, like the Section of the Conveyancing Act which it replaces, extends not only to "money," but also to "securities or other personal property or effects."

The expression "securities" includes "stocks, funds, and shares" (see Section 50, *infra*).

The repealed Section, though retrospective in its operation, so as to include trusts created before the time of its coming into effect, was applicable only to receipts given after that time. In like manner the present Section, whilst it includes trusts created before as well as trusts created after the commencement of the Act (the 1st of January, 1894), is nevertheless applicable only to receipts given after such commencement.

The statutory power given by this Section is sufficient to supply the place of the power of giving receipts formerly inserted in instruments creating or conferring trusts for or powers of sale (*re* Thomas's Settlement, 30 W. R. 244; W. N. [1882] 7).

The receipt should be under the hands of all the trustees who have consented to act.

If the purchase money is to be paid to trustees directly, the purchaser may require all of them to attend personally to receive it, or, if that is impossible, may insist upon its being paid to their joint account at some bank of which he approves (*in re* C. Flower and Metropolitan Board of Works, 27 Ch. D. 592).

Trustees may, however, as we have before seen under Section 17 of this Act, appoint a solicitor to be their agent to receive and give a discharge for any money or valuable consideration or property receivable under the trust, by permitting the solicitor to have the custody of and to produce a deed containing any such receipt as is referred to in Section 56 of The Conveyancing and Law of Property Act, 1881.

Section 17 of this Act, however, only applies to the appointment of a solicitor as agent, and trustees are not justified in appointing one of themselves as agent to receive purchase money on behalf of all (see *in re* C. Flower and Metropolitan Board of Works, *ut supra*).

Section 23 of 22 & 23 Vict. c. 35 is apparently still unrepealed, though it is practically superseded as to trustees by this Section, as it had in fact already been by the repealed Section 36 of The Conveyancing and Law of Property Act, 1881.

Power for executors and trustees to compound, &c.

21. (1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) This Section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4) This Section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act.

Section 21.—This Section in effect re-enacts Section 37 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), repealed by the present Act, and extends it so as to include administrators.

Sub-section 1.—This Sub-section relates exclusively to the nature of the evidence on which an executor or administrator may act with regard to debts alleged to be owing from and claims made upon the estate of his testator or intestate as the case may be in administering that estate.

Sub-section 2.—Executors or administrators are considered in law as one person, and any one of them may by his act bind the rest (Smith *v.* Everett, 27 Beav. 446).

Where there are several trustees appointed, all who accept the office are, in the view of Courts of Equity, acting trustees; and if any one of them, having accepted, declines or becomes incapable of joining in the execution of the trust, it is not competent for the others to act without him. There is no distinction known between an active and a passive trustee, and the rules of equity do not, save perhaps in the case of public trusts, allow some of several trustees, even though they constitute the majority, to bind the rest (*re* Congregational Church, Smethwick, W. N. [1866] 196; Luke *v.* South Kensington Hotel Co., 7 Ch. D. 789, and 11 Ch. D. 121). It is conceived, therefore, that this Sub-section does not, where there are several trustees, enable some of them to exercise the powers conferred by it, without the concurrence of the others, but that the joinder of all will still be necessary.

Sub-section 2 of Section 44 of The Copyhold Act, 1894, however, provides that "where the lords or the tenants are trustees, and one or more of the trustees is abroad or is incapable or refuses to act, any proceedings necessary to be done by the trustees for effecting an enfranchisement under that Act may be done by the other trustee or trustees" (see "The Law as to Copyhold Enfranchisement," by Rudall & Greig, p. 84).

"*Two or more trustees, acting together, may.*"—It is submitted that these words must be read as equivalent to "when there are two or more trustees (*i.e.* several trustees), they, acting together, may."

"*A sole acting trustee may.*"—These words, it is submitted, must be read as equivalent to "where a sole trustee is acting in the execution of trusts, he may"; for, as has already been pointed out, the law knows nothing of an acting trustee, save in the sense of an accepting trustee.

"*Where by the instrument, if any, creating the trust a sole trustee is authorised.*"—Where no express authority is given by the trust instrument to execute the trusts and powers contained in it these words would include an implied authority gathered from the terms of the trust instrument, and there is no express prohibition against one trustee acting alone.

If the trust instrument gives the powers to the "trustees or trustee," a sole trustee would, it seems, be impliedly authorised to act (see *re* Garnett, Orme and Hargreaves, 25 Ch. D. 595).

The power to compromise applies as much to the claim of a legatee as to debts owing to or from the testator's estate (*re* Warren, Weedon *v.* Reading, 32 W. R. 916).

The executor of a person who was a partner in a firm, the property of which included real estate, might, it would seem, enter into a compromise with respect to such real estate (West of England and South Wales District Bank *v.* Murch, 23 Ch. D. 138).

The Sub-section does not authorise executors to enter into a compromise with respect to real estate in which they have been given no interest by the testator, or with respect to the validity of the Will or the testamentary power of the testator (Abdallah *v.* Rickards, 4 Times Reports 622; 32 Sol. J. 525).

Notwithstanding the general terms of this Sub-section, a compromise by executors of a debt due from one of themselves would in all probability not be upheld by the Court unless it were clear that such a compromise would benefit the estate (De Cordova *v.* De Cordova, 4 App. Cas. 692).

It is apprehended that the question to be considered under this Section is whether the trustees or personal representatives have acted in good faith, and that it is not for the trustee or personal representative to show that a particular transaction falling within the Section was a proper one, but for the *cestui que trust* impeaching it to show its impropriety (*re* Brogden, Billing *v.* Brogden, 38 Ch. D. 546; 47 L. T. 61, 64).

The Section applies to all executorships, administratorships, and trusts, whether constituted or created before or after the time of its commencement; but it only extends to transactions under its powers which take place after that time. The repealed Section, which is very similar, except that it does not extend to administrators, was, however, it must be borne in mind, in force from the 31st of December, 1881, down to the commencement of this Act. Prior to the passing of the Conveyancing and Law of Property Act, executors had, under 23 & 24 Vict. c. 145, Section 30, powers similar to those conferred on them by this Section.

Independently of any statutory authority, trustees might, where it was for the benefit of the trust estate, release or compound a debt or allow a reasonable time for its payment (Blue *v.* Marshall, 3 P. Wms. 381, and Forshaw *v.* Higginson, 8 De G. M. & G. 827).

Powers of two or more trustees.

22. (1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2) This Section applies only to trusts constituted after or created by instruments coming into operation after the Thirty-first day of December, One thousand eight hundred and eighty-one.

Section 22.—This Section is a re-enactment of Section 38 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), so far as that Section, which is repealed by the present Act (see Schedule), relates to trustees.

Independently of statutory enactment, it would seem that where there are several trustees the office of trustee is a joint one, and when one of the trustees dies survives to the others, and the trust, being annexed to the office, survives with it (Co. Litt. 113*a*; Lane *v.* Debenham, 11 Hare 188, 192).

So where a power is conferred on persons, not in their individual capacity, but in their character of trustees, such power will belong to the trustees for the time being (Byam *v.* Byam, 19 Beav. 58, 66).

Where the trust estate passes by survivorship to the surviving trustees, all powers constituting an essential part of the trust are deemed to be annexed to the trust estate and to pass with it (Lane *v.* Debenham, *supra*; Watson *v.* Pearson, 2 Ex. 581, 594).

The survivorship of a trust or power, whether annexed to the office of trustee or to the trust estate, will not, it is apprehended, be defeated because the instrument creating the trust contains a power of appointing new trustees (Warburton *v.* Sandys, 14 Sim. 622).

"*Given to or vested in two or more trustees jointly.*"—It is conceived that these words mean given to or vested in the trustees in their capacity of trustees, and not as individuals. If this view be a correct one, a bare power—that is, a power given to strangers to the estate—and a power or authority given to several persons *nominatim*, and therefore in their individual capacity, are not within the Act, and will not survive.

The repealed Section of The Conveyancing Act, 1881, applied as well to powers given to executors as to powers given to trustees, whilst the re-enactment extends in terms only to powers or trusts given to or vested in trustees. By Section 50 of the present Act it is provided that, unless the context otherwise requires, the expressions "trust" and "trustee" shall include "the duties incident to the office of personal representative of a deceased person." However, notwithstanding these somewhat obscure words of definition, it is conceived that the present Section does not extend to the case of a bare power given to executors over a testator's real estate, although such power or authority be given to the executors in their official capacity and not personally; for such a power is clearly not a duty incident to the office of personal representative. It is, therefore, submitted that the law with regard to powers or authorities given to executors over real estate is now on the same footing as it was before the repealed Section came into operation.

The office of executor or administrator survives (Adams *v.* Buckland, 2 Vern. 514).

It was, before the repealed Section came into operation, doubted whether where a mere power is given by a testator to his executors to sell his real estate, such power could be exercised by a sole surviving executor, and that doubt is apparently revived by the repeal of Section 38 of The Conveyancing Act, 1881, without a re-enactment in terms extending to executors. It is, however, submitted that where such a power is given to executors in their official capacity

it is annexed to the office and will survive with it, and can therefore be exercised by a single survivor (see Mr. Hargrave's Note to Co. Litt. 113*a*, and "Sugden on Powers," 8th edition, pp. 126 to 128; and see Crawford *v.* Forshaw [1891], 2 Ch. 261, 265, 267).

Where a power is given to certain persons by name, and they are also appointed executors, it is the duty of the Court to ascertain whether the power is given to the executors in that character, or in an individual and personal capacity (Brassey *v.* Chalmers, 16 Beav. 223; and Crawford *v.* Forshaw [1891], 2 Ch. 261).

Where a power is given to several executors in their official capacity, and one renounces, those who prove may exercise the power (Crawford *v.* Forshaw, *supra*).

If a power is annexed to the office of a sole executor, and he renounces, the power is extinguished (Attorney-General *v.* Fletcher, 5 L. J., N. S., Ch. 75).

By Section 79 of The Probate Act, 1857 (20 & 21 Vict. c. 77), it is provided that "where any person after the commencement of this Act renounces probate of the Will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may without any further renunciation go, devolve, and be committed in like manner as if such person had not been appointed executor."

Section 16 of The Probate Act, 1858 (21 & 22 Vict. c. 95), provides that "whenever an executor appointed in a Will survives the testator, but dies without having taken probate, and whenever an executor named in a Will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall, and may, without any further renunciation go, devolve, and be committed in like manner as if such person had not been appointed executor."

Exoneration of trustees in respect of certain powers of attorney.

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

Provided that nothing in this Section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Section 23.—This Section is, in effect, a re-enactment of Section 26 of 22 & 23 Vict. c. 35, so far as that Section, which is repealed by the present Act (see Schedule), extended to trustees.

The Section, it is apprehended, does little more than express the rule of equity, for the Court would probably be slow to fix with liability a trustee who acted under a power of attorney in good faith and without knowledge of the death of the principal.

A power of attorney may be revoked either by the express declaration of the principal or by implication.

If a power of attorney is given by deed, it should be revoked by deed, though in strictness perhaps this is not absolutely essential, since the grantee of a power of attorney is bound to follow the wishes and directions of the grantor ("The Margaret Mitchell," Swabey's Admiralty Rep. 382).

Where a power is executed for valuable consideration it cannot be expressly revoked whilst the consideration holds (Bromley *v.* Holland, 7 Ves. 28).

A power of attorney will be impliedly revoked—

1. Where the principal ceases to have power over the subject matter of the power.
2. By the insanity of the principal.
3. By the principal becoming bankrupt.
4. By the death of the principal.

As to the effect of supervening insanity of the principal see "Jarman's Bythewood," vol. 8, pp. 36, 37; and as to payments made or acts done in pursuance of a power of attorney without notice of the principal having become lunatic or of unsound mind see Section 47 of The Conveyancing and Law of Property Act, 1881, hereinafter referred to.

As to the effect of the bankruptcy of the principal upon a power of attorney see *ex parte* Snowball (L. R., 7 Ch. 534), Markwick *v.* Hardingham (15 Ch. D. 339), and Elliott *v.* Turquand (7 App. Cas. 79).

A sale under a power of attorney to a *bonâ fide* purchaser without notice of an act of bankruptcy committed by the giver of the power would be good as against the trustee under a subsequent adjudication (see *ex parte* Snowball, *supra*).

Where the power forms the security for a debt, or was executed for valuable consideration, it will not be revoked by the principal's bankruptcy (Alley *v.* Hotson, 4 Campb. 325).

At common law a power of attorney, even though coupled with an interest, was revoked by the principal's death (Watson *v.* King, 4 Campb. 272); but the contrary is said to be the rule of equity. However, in the case of Spooner *v.* Sandilands (1 Y. & C. C. 390), in which the point came directly before the Court, it was apparently held that the power was revoked both at law and in equity by the principal's death, but that the letter of attorney operated not only to confer a power, but also as a charge.

In the case of Kiddill *v.* Farnell (3 Sm. & G. 428) a clause in a power of attorney, in the usual form issued by the Bank of England for the transfer

of stock, to make it good notwithstanding the death of the grantor before transfer was held effectual.

Section 26 of 22 & 23 Vict. c. 35 extended to executors and administrators as well as to trustees, whilst this Section extends in terms only to trustees. However, the expression "trustee" in this Act includes an executor or administrator acting in the duties incident to the office of personal representative of a deceased person. And by Section 47 of The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a general protection is given to every person making or doing any payment or act in good faith in pursuance of a power of attorney, notwithstanding that before the payment or act the donor of the power had died, or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making the same.

Under the provisions contained in Sections 8 and 9 of The Conveyancing and Law of Property Act, 1882, a power of attorney may now, by the instrument creating it, be made absolutely irrevocable when given for valuable consideration, or irrevocable for a fixed time not exceeding one year, whether given for valuable consideration or not.

Implied indemnity of trustees.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

Section 24.—This Section is, in effect, a re-enactment of Section 31 of 22 & 23 Vict. c. 35, that Section being repealed by the present Act (see Section 51 and Schedule).

This Section, like the repealed Section, only expresses the rule of Courts of Equity (*re* Brier, Brier *v.* Evison, 26 Ch. D. 238, 243). Before the repealed enactment came into operation all well-drawn trust instruments contained an indemnity clause to a like effect with the indemnity given by statute.

At law, where trustees join in a receipt, *primâ facie* all are to be considered as having received the money; but the rule of Courts of Equity is that

the mere circumstance of a trustee joining in a receipt for the sake of conformity, without receiving the moneys to which such receipt relates, is not sufficient to charge him in the event of a misapplication by the trustee who actually receives (Brice *v.* Stokes, 11 Ves. 319, 324; *re* Fryer, Martindale *v.* Picquot, 3 K. & J. 317). The trustee, however, to exonerate himself must show that the money acknowledged to have been received by all was, in fact, received by the other trustees, and that he joined only for conformity (Brice *v.* Stokes, *supra*).

Although a trustee may not be chargeable simply by reason of his allowing his co-trustee to receive moneys of the trust, he will become liable for misapplication, if, in breach of his duty, he allow his co-trustee to retain such moneys for a longer period than the actual circumstances require (Brice *v.* Stokes, *supra;* Lincoln *v.* Wright, 4 Beav. 427), or fail to see that they are properly applied for the purposes of the trust (Thompson *v.* Finch, 22 Beav. 316).

Trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with usual care and prudence on their own account would ordinarily conduct through mercantile agents; and when according to the usual and regular course of such business moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys (*ex parte* Belchier, Amb. 218; Speight *v.* Gaunt, 9 App. Cas. 1, 4; and see also The Judicial Trustees Act, 1896, Section 3, and notes thereto, *infra*).

A trustee is justified in depositing trust moneys for temporary purposes in the hands of bankers of good credit (Rowth *v.* Howell, 3 Ves. 565; Wilks *v.* Groom, 3 Dr. 584, 592; Swinfen *v.* Swinfen No. 5, 29 Beav. 211); but the moneys should be paid into the separate account of the trust, and not mixed with the trustee's own moneys (*ex parte* Kingston, *in re* Gross, L. R., 6 Ch. 632).

Where an administrator deposited moneys (part of his intestate's estate) with bankers on a current account separate from his own account, it was held that the fact of the bankers allowing half-yearly interest on the moneys for the time being standing on such current account did not affect the position of the administrator (*re* Marcon's Estate, Finch *v.* Marcon, W. N. [1871] 148).

The Section, however, does not extend its indemnity to cases of wilful default, and a trustee is therefore still liable, in the event of the failure of the bankers, if he allows money to lie in the bankers' hands when he ought to have invested it (Moyle *v.* Moyle, 2 Russ. & My. 710; and Cann *v.* Cann, 33 W. R. 40), or if he leave it in the hands of the bankers when he ought to have paid it over to other parties, as, for instance, to new trustees duly appointed (Lunham *v.* Blundell, 4 Jur., N. S. 3), or if he lend moneys to the bankers by way of loan on their personal security (Darke *v.* Martyn, 1 Beav. 525). Should he keep a larger balance at the bankers' than is reasonably necessary

for the purposes of the trust, he would, in the event of the bankers failing, be liable to make good what the Court should consider to be the excess over the sum which he ought to have had in the bank (Astbury *v.* Beasley, W. N. [1869] 96).

In the case of *re* Jones, Jones *v.* Searle (49 L. T., N. S. 91), it was held that trustees were liable to pay interest on trust moneys which they had mixed with moneys of their own and left in the hands of their bankers.

A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust, and in paying the purchase money to the broker, if he follow the usual and regular course of business adopted by ordinarily prudent men in making such investments (Speight *v.* Gaunt, 9 App. Cas. 1, 4).

A trustee is also justified in employing an agent to collect debts due to the trust estate (*re* Brier, Brier *v.* Evison, 26 Ch. D. 238, 243).

As to the right of a trustee to employ a solicitor, auctioneer, or stockbroker see *re* Blundell, Blundell *v.* Blundell (40 Ch. D. 370, 376).

The rule that trustees acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business (Fry *v.* Tapson, 28 Ch. D. 268).

A trustee who selects as his agents persons properly qualified cannot be made responsible for their intelligence or their honesty; but he cannot entrust them with any duties which they may be willing to undertake, or pay them any remuneration which they may demand, and he is bound to exercise his discretion in the matter (*re* Weall, Andrews *v.* Weall, 42 Ch. D. 674).

In the case of Bostock *v.* Floyer (L. R., 1 Eq. 26) a trustee was held liable for the loss, through the fraudulent conduct of his solicitor, of trust moneys which he had handed to his solicitor for investment, the reason of the decision apparently being that it was not for a specific investment, and that it is not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest.

As to the duties of a trustee when investing trust moneys see the notes to Sections 1 and 8, *supra*.

"*Money and securities actually received by him.*" — The expression "securities" includes stocks, funds, and shares (see Section 50, *infra*).

"*And may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.*"—Independently of statutory enactment, a trustee is, by the rules of equity, entitled to reimburse himself out of the trust estate all costs, charges, and expenses properly incurred by him in the administration of the trust; for, in the words of Lord Cottenham, in the case of the Feoffees of Heriot's Hospital *v.* Ross (12 Cl. & Fin. 507, at p. 515), the first object of a trust is to indemnify those who administer it against any costs properly incurred in its administration.

A trustee is entitled to be indemnified by his *cestui que trust* personally against costs and expenses properly incurred (*ex parte* Chippendale, *re* German Mining Co., 4 De G. M. & G. 19, at p. 54).

Where a trustee has incurred a liability in performance of his duty, it seems that the Court would compel his *cestui que trust* to give him an indemnity, although no loss had actually accrued (Phéné *v.* Gillan, 5 Hare 1, 12, 13).

A trustee is entitled to his expenses notwithstanding that an annuity is given to him under the trust instrument as a recompense for the care and trouble which will attend the due execution of his office (Wilkinson *v.* Wilkinson, 2 S. & S. 237).

Trustees should keep careful account of their disbursements on account of the trust.

As to the right of trustees to reimbursement generally see "Lewin on Trusts," 9th edition, Cap. xxiv., Section 2, where the subject is very fully treated.

It is, however, a rule of the Courts of Equity that a trustee, executor, or administrator shall have no allowance for his care and trouble: the reason being that on these pretences, if allowed, the trust might be loaded and rendered of little value, besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another. There can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not (Robinson *v.* Pett, 3 P. Wms. 132; Moore *v.* Frowd, 3 My. & Cr. 50; *re* Imperial Land Co. of Marseilles, 4 Ch. D. 566, 580; and Barrett *v.* Hartley, L. R., 2 Eq. 789).

It is similarly a rule of equity that a trustee, executor, or administrator may not make any profit out of his trust by acting in his professional or business capacity in the matters of the trust (Scattergood *v.* Harrison, Mos. 128; Sherriff *v.* Axe, 4 Russ. 33; Kirkman *v.* Booth, 11 Beav. 273; and Bainbrigge *v.* Blair, 8 Beav. 588, 596).

So a solicitor trustee cannot by himself, or, if he carry on business in partnership, by his firm, make any charge against his *cestui que trust* except for costs out of pocket (Bainbrigge *v.* Blair, *supra*; Todd *v.* Wilson, 9 Beav. 486; Pollard *v.* Doyle, 1 Dr. & Sm. 319; Broughton *v.* Broughton, 5 De G. M & G. 160; and Burge *v.* Brutton, 2 Hare 373).

The reason why the Court declines to allow a solicitor trustee acting for himself as trustee to make the usual professional charges against the trust fund is, that to do so would be to place a party having a duty conflicting with his interest in the position of having to make out his own bill against himself, leaving any error which might occur to be settled and set right at some future occasion (Bainbrigge *v.* Blair, 8 Beav. 588, at p. 595).

The rule applies equally where the matter is carried through exclusively by a partner of the solicitor trustee who is not concerned in the trust, for what is done is done for the profit of the trustee as partner (Christopher *v.* White, 10 Beav. 523, 525).

Where, however, a solicitor trustee is carrying on business in partnership, and it is stipulated between the partners that a partner being a trustee is not to share in the profits of or take any benefit from business done in respect of any matter where he is a trustee, the trustee partner may employ his partner to act as solicitor to the trust, and pay him the ordinary remuneration (Clack *v.* Carton, 30 L. J., N. S., Ch. 639).

A solicitor who is a trustee, executor, or administrator is under no obligation to act in his professional capacity, but may employ another solicitor to act in the matter of the trust or in winding up the estate (Stanes *v.* Parker, 9 Beav. 389).

In like manner a solicitor mortgagee could not, before the coming into operation of The Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), charge profit costs against the mortgagor, either as to proceedings in an action or business done out of Court (*in re* Wallis, 34 Ch. D. 675; *in re* Wallis, 25 Q. B. D. 176; *in re* Doody [1893], 1 Ch. 129; Eyre *v.* Wynn-Mackenzie [1894], 1 Ch. 218).

The rule is not limited to solicitors, but it extends to any mortgagee who is capable of giving, and who does give, his own personal services in relation to the mortgage debt or security. For instance, if a mortgagee were a surveyor he could not charge for surveyor's work done by himself, though he could charge for the same work if he had employed another surveyor to do it (*in re* Wallis, 25 Q. B. D. 176, 180, 182).

It would seem, however, that the partner of a solicitor mortgagee might have received remuneration for his trouble, and that in the absence of any agreement that the solicitor mortgagee was not to share in the profits arising from the transaction in question, the proper course was to ascertain what the profit costs were, and then to allow the other partner the same share in them as he was entitled to in the general profits of the partnership business (*in re* Doody [1893], 1 Ch. 129).

The Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), provides as follows:—

2. (1) Any solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

(2) This Section applies only to mortgages made after the commencement of this Act.

3. (1) Any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage, or to the security thereby created, or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business, and do such acts, and accordingly no such mortgage shall be redeemed, except upon payment of such charges and remuneration.

(2) This Section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.

4. In this Act the expression "mortgage" includes any charge on any property for securing money or money's worth.

The Mortgagees' Legal Costs Act, 1895, does not extend to Scotland.

In the case of Eyre *v.* Wynn-Mackenzie ([1896] 1 Ch. 135), application for leave to appeal against a judgment dated the 28th of November, 1893, notwithstanding the expiration of the time limited for so doing, on the ground that since the judgment The Mortgagees' Legal Costs Act, 1895, had been passed by which the law as to a solicitor mortgagee's costs had been altered, was refused by the Court of Appeal, on the ground that, though Section 3 of the Act is retrospective in its operation, it could not have been intended to affect judgments of the Court which were right at the time they were given.

It will be observed that the Act in question only relates to professional work done by solicitor mortgagees, and not to work or business by other mortgagees who may be professional men.

PART III.

POWERS OF THE COURT.

Appointment of New Trustees and Vesting Orders.

Power of the Court to appoint new trustees.

25. (1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(2) An order under this Section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this Section shall give power to appoint an executor or administrator.

Section 25.—This part of the Act deals with the important powers vested in the Court of appointing new trustees on summons, and demands a careful and exhaustive discussion, as this and the following Sections replace the hitherto unrepealed Sections of The Trustee Act, 1850.

Taking, then, each part of the Section in succession:—The power is exerciseable by the Court "whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable" to act without the assistance of the Court.

Where there is a valid existing power of appointing new trustees, and a person willing to exercise it, the Court will not exercise the power conferred

by this Section (*re* Sutton, W. N. [1885] 122; *re* Gibbons's Trusts, W. N. [1882] 12). Hence it must be borne in mind that this power of the Court only comes into play when there is no person who will exercise the power. The Court will not intervene and appoint where there is a valid power of appointment, merely upon the suggestion that it will be improperly exercised (*re* Hodson's Trust, 9 Hare 118). But if the trustees are resident out of the jurisdiction, the Court will appoint (*re* Humphrey's Estate, 1 Jur., N. S. 921).

Moreover, contrary to many decided cases, it is now clear that the Court will not, where new trustees have already been appointed out of Court under a valid power, reappoint them for the purpose of making a vesting order (*re* Vicat, 33 Ch. D. 103; *re* Dewhirst's Trusts, 33 Ch. D. 416; and *re* Gardiner's Trusts, 33 Ch. D. 590), though it may be proper to; and the Court will, where there is any reasonable question whether trustees appointed under a power have been duly appointed, reappoint them (see Cotton, L. J., *re* Vicat, *supra*); or the course adopted in *re* Stocken's Trusts (W. N. [1893] 203) may be adopted (though it is inadvisable), where one of the newly-appointed trustees retired, and the Court appointed a person in his place.

The Court will not, on any application for the appointment of new trustees, enter into the question of the validity of the instrument creating the trust (*re* Matthews, 26 Beav. 463).

The following persons have been held to be trustees, in addition, of course, to the cases where they are obviously so:—

(A) A trustee of a composition deed; a trustee of a deed registered under The Bankruptcy Act, 1861; and a bankrupt's assignee (*re* Price, L. R., 6 Eq. 460; *re* Bache, W. N. [1868] 223; *re* Donisthorpe, L. R., 10 Ch. 55; *re* Joyce's Estate, L. R., 2 Eq. 576).

(B) A vendor of land where the title is clear (*re* Lowry's Will, L. R., 15 Eq. 78; *re* Russell, 12 Jur., N. S. 224), or the contract has been executed (*re* Cuming, L. R., 5 Ch. 72), or where it has been the subject of an award (*re* Taylor, W. N. [1865] 2); but if the title is not clear it must be established in a suit (*re* Carpenter, Kay 418; *re* Weeding, 4 Jur., N. S. 707; *re* Faulder, W. N. [1866] 83).

(C) A vendor of copyholds who has covenanted to surrender, and has received the price (*re* Collingwood's Trusts, 6 W. R. 536; *re* Cuming, L. R., 5 Ch. 72). But a vendor who has not received the price, and who dies, would not be a trustee for the purposes of this Act, in accordance with decisions on the repealed Trustee Act of 1850 (*re* Colling, 32 Ch. D. 333).

(D) A vendor or constructive trustee of stocks or shares or a legacy (*re* Angelo, 5 De G. & Sm. 278; *re* Davis's Trusts, L. R., 12 Eq. 214).

The cases where the Court considers it expedient are not absolutely definable, but may be grouped, so far as the decided cases go, under the following heads:—

(*a*) Where a trustee is an infant the Court will appoint another trustee in the infant's place, but without prejudice to any application by the infant on coming of age to be restored to the trusteeship (*re* Shelmerdine, 33 L. J., Ch. 474; see also *re* Porter's Trust, 2 Jur., N. S. 349; and *re* Gartside's Estate, 1 W. R. 196).

(*b*) The Court has also considered it expedient where all the trustees have died in the testator's lifetime, and there are therefore no trustees, or where there was no representative of a last surviving trustee or difficulty in obtaining administration (*re* Smirthwaite's Trusts, L. R., 11 Eq. 251; *re* Moore, McAlpine *v.* Moore, 21 Ch. D. 778; *re* Williams's Trusts, 36 Ch. D. 231; *re* Matthews, 26 Beav. 463; Davis *v.* Chanter, 4 Jur., N. S. 272; *re* Davis's Trusts, L. R., 12 Eq. 214). The decision in *re* Moore, McAlpine *v.* Moore, must not be construed to lay down any rule that the Court can appoint executors, though the expressions in the judgment might lend some sanction to this view. But Sub-section 3 of the Section now under discussion negatives the existence of any such power expressly.

(*c*) In cases where there is a doubt whether the power of appointment applies, the Court will appoint new trustees (*re* Woodgate's Settlement, 5 W. R. 448; *re* Armstrong's Settlement, *ibid.*).

(*d*) Where a trustee is bankrupt the Court can, if it thinks fit, remove him, and appoint another in his place, whether he consents or not (see last clause of Sub-section 1, and also Coombes *v.* Brookes, L. R., 12 Eq. 61; *re* Adam's Trusts, 12 Ch. D. 634; *re* Foster, 55 L. T. R., N. S. 479; and *re* Mace's Trusts, W. N. [1887] 232; and see also Section 147 of The Bankruptcy Act, 1883).

(*e*) Where a trustee is a lunatic the Court can appoint a new trustee. Formerly the practice was that the application should be entitled in Chancery alone, unless a vesting order was desired, in which case it had to be entitled "In Lunacy" as well (*re* Vicker's Trusts, 3 Ch. D. 112; *re* Mason, L. R., 10 Ch. 273); but if the lunatic trustee was out of the jurisdiction, the application need only be entitled "In the Chancery Division" (*re* Gardner's Trusts, 10 Ch. D. 29; see also *re* Dewhirst's Trusts, 33 Ch. D. 416; *re* Martin's Trusts, 34 Ch. D. 618; and *re* Barber, 39 Ch. D. 187). At the present time the application would be by summons under The Lunacy Act, 1890, unless a vesting order is sought, when it must be by petition (Rules in Lunacy, 1892, Rules 18, 19, and 57).

(*f*) Where a trustee is convicted of felony (see last clause of Subsection 1).

(*g*) Where a trustee has absconded and cannot be discovered.

(*h*) Where a trustee has gone to reside abroad permanently (*re* Bignold's Settlement Trusts, L. R., 7 Ch. 223).

(*i*) Where incapacity has been caused by age or infirmity (*re* Lemann's Trusts, 22 Ch. D. 633, where a trustee had become incapable of acting by reason of old age and consequent bodily and mental infirmity). In *re* Barber (39 Ch. D. 187) a person who was a paralytic and deprived of the power of speech and unable to read and write, but not suffering from any mental disease, was held to be removable by the Chancery Court (see also *re* Phelps's Settlement Trusts, 31 Ch. D. 351; commented on in *re* Martin's Trusts, 34 Ch. D. 618). But this jurisdiction cannot be resorted to where there is a controversy as to the facts, as in *re* Blanchard (3 De G. F. & J. 131).

Under the powers of this Section the Court can appoint a new trustee or new trustees either—

(*a*) In substitution for any existing trustee or trustees;

(*b*) In addition to any existing trustee or trustees; or

(*c*) Although there is no existing trustee.

The Court will not necessarily limit itself to the original number of trustees, but, whatever the original number, it will not reduce it unless an administration action is pending, or the trust property is immediately divisible, or about to be paid into Court (*re* Gardiner's Trusts, 33 Ch. D. 590; Davies *v.* Hodgson, 32 Ch. D. 225; *re* Lamb's Trusts, 28 Ch. D. 77; and see *re* Stokes's Trusts, L. R., 13 Eq. 333; *re* Harford's Trusts, 13 Ch. D. 135; *re* Tatham's Trusts, W. N. [1877] 259; *re* Aston, 23 Ch. D. 217; and *re* Martyn, 26 Ch. D. 745).

If there were originally one trustee, one new one may be appointed (*re* Reynault, 16 Jur. 233, though in this case the trust was coming to an end). The Court has appointed two instead of one (*re* Tunstall's Will, 4 De G. & Sm. 421). If there were two old trustees, the Court, as stated above, will never appoint less than two new ones, and has sometimes added to that number, as in *re* Boycott (5 W. R. 15), where it appointed two in addition to the original two trustees.

In the case of a charity where there were ten trustees, the Court on appointing that number directed that when they became reduced to three they should apply in Chambers for an appointment of others to fill up the number (*re* Bergholt, 2 Eq. Rep. 90).

As to the persons the Court appoints as trustees. The following persons are not eligible for appointment by the Court as trustees:—

(A) *Persons resident out of the jurisdiction* (*re* Guibert, 16 Jur. 852; Curtis's Trust, Ir. R., 5 Eq. 422).—Under special circumstances, as where the bulk of the property is abroad, the Court will appoint such persons, and can, and does, allow remuneration out of the trust property for their services (*re* Freeman's Settlement Trusts, 37 Ch. D. 148). So, too, where all the *cestui que trusts* are resident out of the jurisdiction (*re* Liddiard, 14 Ch. D. 310). In this case the property was English personalty, but it was intended to sell it and invest in the country where the beneficiaries lived, some of them being infants (see also *in re* Drewe, W. N. [1876] 168). The case of *re* Freeman's Settlement Trusts is a particularly instructive case. There the *cestui que trusts*, some of whom were infants, were all resident out of the jurisdiction, either in Canada or the United States. It being necessary to appoint new trustees, the Court appointed two Canadians resident there and their English agent trustees, but required an undertaking by the trustees out of the jurisdiction, in case the power of appointing new trustees should become exerciseable by them, or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the Court. The Court also, subject to the production of evidence as to the number of the holdings, the rents and dates of payment, the necessity of paying a commission for collecting the rents, and that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee. The property in this case was real estate (see also *re* Simpson, W. N. [1897] 105). The case of Marshall *v.* Holloway (2 Sw. 432, 453) was cited as authority for the proposition that the Court can authorise both prospective and retrospective allowances to a trustee for time, pains, and trouble in management.

(B) *Aliens.*—The Court objects to appoint aliens, because they are, as a rule, out of the jurisdiction; but where the *cestui que trusts* were living abroad and English trustees could not be found the Court has appointed aliens (*re* Hill's Trust, W. N. [1874] 228). In that case the property was realty and personalty in England, the *cestui que trust* being resident in France; two Frenchmen were accordingly appointed trustees. Where, by inadvertence, an alien was appointed, the Court has subsequently, upon a rehearing, discharged the order (*re* Giraud, 32 Beav. 385).

(C) *Any of the cestui que trusts*, unless it cannot be avoided (*ex parte* Clutton, 17 Jur. 988; *re* Clissold, 10 L. J., N. S. 642; *ex parte* Conybeare's Settlement, 1 W. R. 458).—In *re* Burgess's Trusts, where it was found impossible to induce anyone, not a *cestui que*

trust, to become a trustee, an undertaking had to be given by them that whenever either became a sole trustee, he should immediately take steps to appoint another co-trustee, following *re* Hattatt's Trusts (W. N. [1870] 14). See also *re* Davis's Trusts (L. R., 12 Eq. 214, at p. 217). The husband of a *cestui que trust* can be appointed, especially if he be one of three trustees (*re* Hattatt's Trusts, W. N. [1870] 14; *re* Burgess's Trusts, W. N. [1877] 87), a similar undertaking being exacted as in the case of a *cestui que trust* being appointed a trustee. In one case a member of the firm of solicitors acting for the petitioners has been appointed (*re* Brentwall's Trust, W. N. [1872] 77), but as a rule the solicitor acting for a party will not be appointed (*re* Orde, 24 Ch. D. 271, at p. 272).

(D) *Trust Corporations.*—The Court has refused to appoint a trust corporation a trustee, but has appointed certain individuals nominated by it (*re* Brogden, Billing *v.* Brogden, W. N. [1888] 238; and see Law Guarantee Society *v.* Bank of England, 24 Q. B. D. 406).

But the Court can now, under The Judicial Trustees Act, 1896, appoint a judicial trustee to be a trustee, either jointly with any other person or as sole trustee (see the notes to this Act, and the rules under it, *infra*).

Generally, the Court can appoint separate sets of trustees for distinct trusts under this Act (Cotterill's Trusts, W. N. [1869] 183; Cunard's Trusts, 27 W. R. 52; Moss's Trusts, 37 Ch. D. 513; and see the notes to Section 10, Sub-section 2 (*b*), of this Act, p. 55, *supra*).

An affidavit of fitness of the trustees is always required by the Court, and should show something as to the position of the proposed trustees in respect of their pecuniary means (*re* Castle, Sterry's Trusts, W. N. [1888] 179). The description of deponent of such an affidavit as a "gentleman" is insufficient, and the costs of such an affidavit will be disallowed (*re* Horwood, W. N. [1886] 139; *re* Orde, 24 Ch. D. 271; but see *re* Dodsworth, Spence *v.* Dodsworth [1891], 1 Ch. 657). Where an affidavit containing such a description of a trustee was allowed to be filed, Chitty, J., remarked that *re* Horwood (55 L. T., N. S. 373) and *re* Orde only held the description "gentleman" insufficient for the particular purpose of weighing the value of the deponent's evidence, and of weighing the value of evidence of fitness of a proposed trustee. A statement that trustees were of "good credit" is a sufficient statement of pecuniary means (*re* Smith's Policy Trusts, W. N. [1894] 68).

The consent of a new trustee to act is now to be evidenced by a written consent, to be signed by him, and verified by the signature of his solicitor (R. S. C. 1883, Order XXXVIII., Rule 19 [*a*]). This rule does not apply to lunacy proceedings (*re* Wilson, 31 Ch. D. 522); but it does apply to proceedings entitled "In the Chancery Division," as well as "In Lunacy" (*re* Hume, 35 Ch. D. 457). The Rules in Lunacy, 1892, Rule 92, have, however, now assimilated the practice.

The application for the appointment of new trustees is made by summons in Chambers under R. S. C. (Trustee Act), 1895, Rule 5 (R. S. C. 1893, Order LV., Rule 13 [*a*]).

As altered by the Rules of the Supreme Court, February, 1895 (which added the words in brackets below), this Rule is as follows:—

> Any of the following applications under The Trustee Act, 1893, may be made by summons:—
>
> (A) An application for the appointment of a new trustee, with or without a vesting or other consequential order.
>
> (B) An application for a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court, or by a Judge, or out of Court.
>
> (C) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock [or the suing for or recovering any chose in action].
>
> (D) An application relating to a fund paid into Court in any case [coming within the provisions of Rule 2 of this Order].

Order LV., Rule 15 (*a*), should also be read in connection with these Rules:—

> No order appointing a new trustee and no vesting or other order consequential on the appointment of new trustees shall be made except by the Judge in person.

The case of *re* Peach (33 Sol. J. 575), where it was held that a petition was necessary when the trustees have been appointed out of Court, is rendered obsolete by these Rules and need not be further referred to.

Application under these Rules will be by originating summons, unless there is pending an action or proceeding in which a summons can be taken out.

For Forms see Appendix V., *infra*, Forms 7, 8, and 9.

As to (A)—The right to go by petition is not taken away, but should only be resorted to in cases of difficulty or intricacy not easily dealt with otherwise (*re* Morris, 37 W. R. 317, and *re* Broadwood, 55 L. J., Ch. D. 666; and see also *re* Atkinson's Policy Trusts, 13 R. Mar. 186).

As to (B)—The vesting or other order referred to in this Rule must be one "consequential on" the appointment of a new trustee or trustees.

As to (C)—This part of the Rule is referable to Section 30 of The Trustee Act, 1893, and Section 1 of The Trustee Act, 1893, Amendment Act, 1894.

Land or *stock* can be vested.

The form in which a vesting order on the appointment of new trustees should be made has given rise to considerable discussion, but seems finally

decided by the cases of *in re* New Zealand Trust and Loan Co. ([1893] 1 Ch. 403) and *in re* Gregson ([1893] 3 Ch. 233).

From the judgment in the latter case it would appear that where the shares to be transferred to the new trustees are fully paid up the form should be as follows (following the form in *re* Peacock, 14 Ch. D. 212):—"It is ordered that the right to call for a transfer and to transfer into their own names or otherwise to a purchaser or purchasers the following stocks or shares, and to execute all such deeds and instruments as may be necessary for the purpose, do vest in the said H. and B.: that is to say &c. . . . and it is ordered that the right to receive the dividends due (if any) and to accrue due on all or any or either of the before-mentioned stocks and shares do vest in the said H. and B." (see *in re* New Zealand Trust and Loan Co. ([1893] 1 Ch. 403, note on p. 405).

If there be any liability on the shares, as the trustees cannot presumably intend to become shareholders and so expose themselves to liability, the proper form will be to direct that "the right to call for a transfer of and to transfer the sum of and to receive any dividends due and to accrue due thereon do vest" &c.

The case of *in re* Tweedy (28 Ch. D. 529) gives the recitals which it is proper to insert in an order appointing new trustees.

Parties.—The applicant for the appointment of new trustees may be any beneficiary or duly appointed trustee (Section 36, *infra*).

The respondents should be, as a general rule, all the beneficiaries who are applicants. The new trustees need not be made parties, but any retiring trustee should be (*re* Sloper, 18 Beav. 595).

Service.—Service on a respondent living abroad may be dispensed with (*re* Wilson, 31 Ch. D. 522).

As to (D)—The practice as to funds which have been paid into Court under The Trustee Act is dealt with in the notes to Section 42, *infra*.

Sub-section 2.—The effect of this is simply that the trustees who cease to be trustees when new ones are appointed by the Court are not liable for anything taking place after their retirement.

Sub-section 3.—An executor can only be appointed by a testator himself; an administrator by the Court of Probate (see *re* Willey, W. N. [1890] 1). The case of *in re* Moore, McAlpine *v.* Moore (21 Ch. D. 778), where Kay, J., is reported to have appointed a trustee or trustees "to perform the duties incident to the office of an executor," is commented on in Eaton *v.* Davies (W. N. [1894] 32), where Kekewich, J., points out that the judgment of Kay, J., in the former case had been misapprehended, and that he must be taken to have meant no more than that the definition in Section 2 of The Trustee Act, 1850, enabled him to make the order in the particular case before him, where there was no existing trustee, and that that judgment must be read

with the qualification suggested by Cotton, J., in *re* Willey (*ubi supra*) to the effect that the Act (and therefore this Act) did not authorise the appointment of a trustee to discharge duties which belonged, not to the office of a trustee, but only to that of an executor. Where a trustee is a lunatic, then, unless he is an infant or is out of the jurisdiction, the application (see *re* Gardner, 10 Ch. D. 29) will have to be made in Lunacy alone under The Lunacy Acts, 1890 and 1891, and the Rules thereunder. These Rules came into force on 1st March, 1892, and are printed in W. N., 19th March, 1892, p. 7, as amended by the Rules of 15th June, 1893, which came into operation in July, 1893, and are printed in W. N., 24th June, 1893, p. 3.

The following are the Sections in The Lunacy Act, 1890 (53 & 54 Vict. c. 5), dealing with lunatic trustees:—

VESTING ORDERS.

135. (1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the Judge in Lunacy may by order vest such land in such person or persons, for such estate, and in such manner as he directs.

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the Judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the Judge directs.

(3) An order under Sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(4) In all cases where an order can be made under this Section the Judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under Sub-sections (1) and (2).

(5) Where an order under this Section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands, and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons

in whose place an appointment is made were free from disability, and had executed and done such assurances and things.

136. (1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the Judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust, or by way of mortgage, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3) When any stock is standing in the name of a deceased person whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the Judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4) In all cases where an order can be made under this Section the Judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the bank, and all other companies and their officers, and all other persons shall be bound to obey every order under this Section according to its terms.

(6) After notice in writing of an order under this Section, it shall not be lawful for the bank or any other company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the bank, or the company, or society, whose stock is to be transferred.

138. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court have jurisdiction, upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

139. The Judge in Lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any Court upon any question as to the validity of the order, but this Section shall not prevent a Judge of the High Court from directing a reconveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land, or right to pay any costs occasioned by the order when the same appears to have been improperly obtained.

This Section has been repealed by Section 51 *of The Trustee Act,* 1893, *but it is virtually re-enacted by Section* 40 *of that Act.*

141. In every case in which the Judge in Lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

142. The Judge in Lunacy may order the costs of or incident to obtaining an order under the provisions of this Act as to vesting orders, and carrying the same into effect, to be paid out of the land or personal estate, or the income thereof, in respect of which the order is made, or in such manner as the Judge may think fit.

143. The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

The following are the Rules in Lunacy under the above Sections of the Act of 1890*:—

THE RULES IN LUNACY, 1892.

Dated 6th February, 1892.

Vesting Orders.

Applications under that portion of The Lunacy Act, 1890, which relates to "Vesting Orders" may be made—

(*a*) Where the application is for the appointment of new trustees, or relates to property subject to a trust by any person beneficially interested in the property, whether under disability or not, or by any duly appointed trustee thereof.

(*b*) Where the application relates to any property subject to a mortgage by any person beneficially interested in the equity of redemption, or in the mortgage money, whether under disability or not.

*The application must be by petition (Rules in Lunacy, 1892, Rules 18, 19, and 57).

The application shall be intituled in the matter of the trust or mortgage, and of the particular lunacy, and in the matter of The Lunacy Act, 1890.

The applicant shall serve any such application upon the person or persons who, according to the practice of the Chancery Division of the High Court, would be required or entitled to be served in similar cases.

APPLICATION FOR VESTING ORDER.

IN LUNACY.

In the Matter of the Trusts of an Indenture dated the and made between

and

In the Matter of A. B., a person of unsound mind [*or as the case may be*],

and

In the Matter of The Lunacy Acts, 1890 and 1891.

Vesting orders as to land.

26. In any of the following cases: namely—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person—

(A) is an infant, or

(B) is out of the jurisdiction of the High Court, or

(C) cannot be found; and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

Vesting orders as to land.

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(*a*) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(*b*) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Section 26.—This Section is confined to cases of trusteeship, and does not apply to the case of an infant mortgagee, as Section 7 of The Trustee Act, 1850, did: this is, however, met by Section 28, *infra*. The Definition Section (Section 50) clearly excludes a mortgagee. In these instances, and subject to the provisions above mentioned, the Court can, on the appointment of new trustees, vest the land, or release the contingent right thereto.

This Section, along with Sections 28 and 32, replaces Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, and 34 of The Trustee Act, 1850, so far as they affect trustees, and Section 2 of The Trustee Extension Act, 1852.

Sub-section (i.).—Under the former Acts, and it is apprehended under this Act, the Court can, and will, make a vesting order when appointing a new trustee, even though there is no incapacity in the person possessed of the legal

estate to convey it to the new trustee (*re* Manning's Trust, Kay, App. xxviii.), and if the new trustees are appointed in a suit a vesting order may be made subsequently (*re* Hughes's Settlement, 2 Hem. & Miller 695).

Where the evidence required on the appointment of a new trustee is not produced on the making of the vesting order, the latter will be post-dated (*re* Havelock's Trust, 11 Jur., N. S. 906).

It is clear that this Section includes the case of leaseholds, which are within the definition of "land" (see Section 50, *infra*), and the substitution of the words "entitled to or possessed of" in this Section for the words "seised or possessed of," which were used in the similar Section of The Trustee Act, 1850, supports this view. Indeed it has been held that Section 34, which is replaced by this Section, applied to leaseholds. The assent of the landlord to the vesting order is not needed unless there is a restriction against alienation (see *re* Matthews's Settlement, 2 W. R. 85; *re* Driver's Settlement, L. R., 19 Eq. 352; *re* Dalgleish's Settlement, 4 Ch. D. 143; and *re* Rathbone, 2 Ch. D. 483, which overrules *re* Dalgleish's Settlement, 1 Ch. D. 46). An order can be made even where the land has escheated, if the Crown assents to the vesting order (*re* Martinez's Trust, W. N. [1870] 70).

Sub-section (ii.).—Under this Sub-section the Court can make a vesting order where the trustee is seised, possessed, or entitled to any land or a contingent right therein—

1. Solely.
2. Jointly with any other person.

1. "Solely" seised.

A coparcener who has no beneficial interest and holds in trust for the other coparcener is solely seised (McMurray *v.* Spicer, L. R., 5 Eq. 527); but in *re* Greenwood's Trusts (27 Ch. D. 359) it was held that the words "seised jointly" in Section 10 of The Trustee Act, 1850 (which is replaced by the Section now under consideration), are not strictly limited to a legal joint tenancy, but are used in the widest sense, and include a case of land vested in coparceners, one of whom is out of the jurisdiction (*re* Greenwood's Trusts, 27 Ch. D. 359). Where trustees of realty have disclaimed, the heir is a trustee within the Act, and so, too, where the trustees have all died in the testator's lifetime (Wilks *v.* Groom, 6 De G. M. & G. 205; *re* Gill, 1 Seton, 4th edition, 520).

Where a vendor dies after a contract to sell has been entered into, but before conveyance, the sale having, in equity, converted the property *into personalty*, the heir is a trustee within this Section (*re* Badcock, 2 W. R. 386). In the case of a sale of realty which has not been converted, the infant heir is not a trustee until a decree of a Court has been made to that effect, or unless the purchase-money has been paid to the vendor in his lifetime (*re* Cuming L. R., 5 Ch. 72; and see note to Section 50, *infra*). Whether there need be a decree or not depends on whether the contract is executed or unexecuted.

Giffard, J., in *re* Cuming, says: "Where there is only a contract for sale a suit is necessary to declare the vendor a trustee; but where the contract has been executed by payment of the purchase-money and a formal covenant to surrender, I think that no suit is necessary."

2. "Jointly" seised.

Joint mortgagees are not within this Section as trustees (*re* Walker's Mortgage Trusts, 3 Ch. D. 209; and see Section 50).

But the co-heirs of a mortgagee are trustees within the Act; and if one be in the jurisdiction and one out, the latter is a trustee for the persons entitled to the mortgage moneys (*re* Templer's Trust, 4 N. R. 494; see also *re* Hughes's Settlement, 2 Hem. & Miller, 695).

(A) *Where the Trustee is an Infant.*

In the absence of any definition in this Act (Section 50) excluding an infant of unsound mind from the term "an infant," it seems that the case of a trustee who is an infant and of unsound mind falls under the jurisdiction herein given to the Court of Chancery. This appears to be clear from the terms of Section 143 of The Lunacy Act, 1890, which enacts that "the provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant." The Sections of The Lunacy Act, 1890, dealing with vesting orders are Sections 135 to 143, and are set out, *supra*, p. 100, together with the Rules relating thereto. They appear not to contemplate the case of an infant trustee who is lunatic, which affords an additional argument in support of the view above stated.

In Powell *v.* Matthews (1 Jur., N. S. 973) it was held that a vesting order under the similar Section will, if consented to by the protector of the settlement, bar all estates in the remainder, and not pass a base fee only under The Fines and Recoveries Abolition Act, 1834.

(B) *Where the Trustee is Out of the Jurisdiction of the High Court.*

Mere temporary absence is not sufficient to enable the Court to act: as where the captain of a merchant vessel was away on a voyage (Hutchinson *v.* Stephens, 5 Sim. 499). Even where a trustee has appeared by counsel he may be treated as out of the jurisdiction (Stillwell *v.* Ashley, not reported, 1 Seton, 4th edition, 520). Service of a petition for vesting an outstanding legal estate was dispensed with in the case of the heirs of a trustee who had been out of the jurisdiction of the Court (*re* Stanley's Trusts, W. N. [1893] 30).

If the trustee out of the jurisdiction is of unsound mind, this Section applies, and the application need only be made in Chancery and not in Lunacy (*re* Gardner's Trusts, 10 Ch. D. 29); *contra*, if he is in the jurisdiction of the Court (see *supra*, p. 100, as to powers of Court in cases of lunacy).

As to service not being necessary in the case of a trustee of unsound mind see *re* East (8 Ch. 735) and *re* Green (10 Ch. 272).

(c) *Where the Trustee Cannot be Found.*

A mortgagor who has deposited deeds by way of equitable mortgage, against whom a decree of foreclosure had been made, and who could not be found, is a trustee within this Section (Lechmere *v.* Clamp, 30 Beav. 218; 31 Beav. 578). Another instance will be found in *re* Walker's Mortgage Trusts (3 Ch. D. 209). In Dugmore *v.* Suffield (W. N. [1896] 50), one of four trustees of a settlement having absconded was adjudicated a bankrupt, and could not be found. It was held that the Court could, under Sections 26 and 35 of this Act, make a vesting order. In *re* Lees's Settlement Trusts ([1896] 2 Ch. 508), where one of four trustees was an absconding bankrupt, the Court made an order vesting the trust estate in the other three trustees, although the number of trustees was thereby diminished.

Sub-section (iii.).—There is no presumption as to the time when one of two persons died, if dying in the same accident, shipwreck, or battle (Wing and Angrave, 8 H. L. C. 183; see also *re* Phéné's Trust, L. R., 5 Ch. 139, and *re* Corbishley's Trusts, 14 Ch. D. 846).

Sub-section (iv.).—A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it (*re* Phéné's Trust, L. R., 5 Ch. 139).

Sub-section (v.).—The Court can make a vesting order under this Sub-section—

(*a*) Where there is no heir or personal representative to a trustee; or

(*b*) Where it is uncertain who is the heir or personal representative or devisee.

This Sub-section replaces Sections 15 and 34 of The Trustee Act, 1850, and does away with the difficulty that it was only when new trustees were appointed under Section 34 that such an order could be made in relation to leaseholds. "Land" as defined in the present Act clearly covers the case of leaseholds for years, and the Sub-section now under discussion goes further than Section 15 of the old Act, as it includes the case of a trustee having no personal representatives, which obviously contemplates personalty. The difficulty as to leaseholds was generally surmounted by appointing new trustees under Section 34, and then vesting the leaseholds. *Re* Mundel's Trust (8 W. R. 683) and *re* Harvey (1 Seton, 520) are therefore no longer law, and the expedient usually resorted to, and sanctioned by *re* Driver's Settlement (L. R., 19 Eq. 352), *re* Rathbone (2 Ch. D. 483), *re* Dalgleish (4 Ch. D. 143), *re* Mundel's Trust (6 Jur. N. S. 880), *re* Matthews's Settlement (2 W. R. 85), and *re* Robinson's Will (9 Jur. N. S. 385), is not of further interest. A vesting order can be

made vesting the property in a person absolutely entitled under this Section (*re* Godfrey's Trusts, 23 Ch. D. 205). The L.JJ. in Lunacy will not make such an order (*re* Currie, 10 Ch. D. 93; *re* Holland, 16 Ch. D. 673).

Sub-section (vi.).—This is in lieu of Section 2 of The Trustee Extension Act, 1852.

The jurisdiction arises not only where there has been *wilful refusal*, but also where there has been *mere neglect* to convey the land or release the right for twenty-eight days after the date of the requirement. For decisions showing what is *wilful refusal* see *re* Mills's Trusts (40 Ch. D. 14) and Knight *v.* Knight (W. N. [1866] 114). It is not "wilful" if the trustee on good grounds entertains a *bonâ fide* doubt of the title of the person calling for the conveyance.

A written demand will usually—but not necessarily—be made, either by the party entitled to have the conveyance or by his agent, as, for instance, his solicitor.

If a married woman refuse, a vesting order can be made (Rowley *v.* Adams, 14 Beav. 130).

Where a mortgagor of copyholds who had covenanted to surrender within a certain time had not done so, a vesting order was made by the Court (*re* Crowe's Mortgage, L. R., 13 Eq. 26).

The High Court may make an order vesting the land in any such person, in any such manner, and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

"*Land.*"—In Section 50 "land" is defined as including "manors, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land."

"Incorporeal hereditaments" is a wide and somewhat indefinite term; but the following are certainly included within it: Advowsons, tithes, commons, ways, watercourses, lights, offices, dignities, franchises, corodies, pensions, annuities, and rents (2 Bl. Com. 21). In "Hales's Analysis," page 48, the following enumeration is given:—"Rents, services, tithes, commons, and other profits *in alieno solo*; pensions, offices, franchises, liberties, villeins, dignities."

Copyholds clearly come within the term "corporeal hereditaments" (see Section 34, *infra*).

The Court can by the vesting order vest the land in new trustees, if such are appointed (see Proviso [*a*]), or if none are appointed, then in the sole continuing trustee, or in the continuing trustee and new trustee (see Proviso [*b*]). It was at one time doubted whether the Court could do this under the Sections of the Act replaced by this Section, but the cases of Smith *v.* Smith (3 Drewry 72) and *re* Marquis of Bute's Will (1 Johns. 15) have set this doubt at rest, and the express words in Proviso (*b*) of this part of the Section render it quite clear that it can be done, notwithstanding *re* Watts's Settlement (9 Hare, 106) and *re* Plyer's Trust (*ibid.* 220).

The Court can, in short, divest the whole estate from the continuing and incapacitated trustees, and vest it in the new body, whether composed of

the old trustees or not, as joint tenants (*re* Fisher's Will, 1 W. R. 505; and Smith *v.* Smith, *ubi supra*). The Court cannot and will not give any directions as to the mode of administration of the trust: its duty is confined to putting the funds in proper hands, to be administered in accordance with the trust deed, will, or other document (*re* Taylor, 2 De G. F. & J. 125).

Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

Section 27.—This Section replaces Section 16 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and in Wake *v.* Wake (1 W. R. 283)—a decision under that Section and equally applicable to the substituted enactment—the Court discharged the contingent rights of unborn children in favour of purchasers under a decree, and made an order vesting in such purchasers the estates of infants and the contingent estates of unborn infants. In Hargreaves *v.* Wright (*ibid.* 408) the Court decreed, in a suit for specific performance, that on each purchaser in that case making payment into Court the estate comprised in his contract should be discharged from the contingent rights of unborn persons claiming under a settlement.

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land, by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

Section 28.—This Section deals with the case of an infant mortgagee, and enables the Court to act in the same manner as it could do in the case of an infant trustee; and it replaces Sections 7 and 8 of The Trustee Act, 1850, so far as those Sections have not been dealt with by the preceding Sections of this Act—*i.e.* it deals with cases of an infant mortgagee only (see notes to next Section, and see also Section 30 of The Conveyancing Act, 1881).

The words explanatory of the powers of the Court in dealing with the infant's interest are very comprehensive: the order may *vest*, *release*, or *dispose of* the land, contemplating, evidently, either an out-and-out appointment of new trustees, or the continuance of one or more of the old trustees, together with one or more new ones in the trust.

As the Court is empowered to make "an order in like manner as in the case of an infant trustee," a reference to Section 26 of this Act, and the notes thereon, will show the scope of this.

In the former Act of 1850, Section 2 contained a definition of "person of unsound mind," which was defined to mean "any person, not an infant, who not having been found a lunatic shall be incapable from infirmity of mind to manage his own affairs." The present Act does not contain any similar definition, but, notwithstanding this, it would appear that, no qualifying words being used, an infant, even though of unsound mind, comes within the operation of the Section, and, therefore, no resort to the lunacy jurisdiction need be had, but the ordinary jurisdiction in Chancery applies (*re* Arrowsmith's Trusts, 4 Jur., N. S. 1123).

Under the old practice it was not necessary to serve the infant with the petition (*re* Tweedy, 9 W. R. 398; *re* Willan, *ibid.* 689); but in *re* Jones's Mortgage (22 W. R. 837)—a petition under the Trustee Act—Jessel, M. R., considered it was contrary to principle to take an estate out of a person without giving him notice. This practice should certainly be followed in applications under the present Act, and the infant should be served.

Vesting order in place of conveyance by heir or devisee of heir, &c., for personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the Court may direct in any of the following cases: namely—

(*a*) Where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction of the High Court or cannot be found; and

(*b*) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same, or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and

(*c*) Where it is uncertain which of several devisees of the mortgagee was the survivor; and

(*d*) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and

(*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

Section 29.—This Section replaces Section 19 of The Trustee Act, 1850, but it differs in some respects from the repealed Section: thus, for the words "*any person to whom any lands have been conveyed by way of mortgage*" in Section 19 of The Trustee Act, 1850, the words "*a mortgagee of land*" are substituted in this Act, relying no doubt on the definition in Section 50 of the expressions "mortgage" and "mortgagee" as including and relating to "every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee."

But this variation will not affect the construction and scope of the enactment. A more important variation is the insertion in each of Sub-sections (*a*), (*b*), (*d*), and (*e*) of the words "personal representative." This addition is introduced in view of Section 30 of The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), whereby it was enacted that estates or interests of inheritance vested in any person solely on any trust or by way of mortgage should, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative or representatives.

By Section 45 of 50 & 51 Vict. c. 78, it was enacted that Section 30 of The Conveyancing Act, 1881, "shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage." Hence copyholds vested in a sole mortgagee will still descend to his devisee or heir, as the case may be, and the aid of this Section of The Trustee Act, 1893, may have to be invoked. The reference to the heir or devisee in Sub-sections (*a*), (*b*), (*c*), (*d*), and (*e*) of this Section have reference probably solely to copyhold property (see *re* Mills's Trusts, 37 Ch. D. 312).

The conditions precedent to this Section coming into operation are apparently—

1. Where a mortgagee of land has died without having entered into possession, and either—
2. The money due in respect of the mortgage has been paid to a person entitled to receive the same; or
3. The person entitled to receive that money consents to any order for the reconveyance of the land.

Re Meyrick's Estate (9 Hare, 116) was decided on this footing, but overruled in *re* Boden's Trust (1 De G. M. & G. 57; 9 Hare, 820: see also *re* Quinlan's Trust, 9 Ir. Ch. Rep. 306, and *re* Lea's Trust, 6 W. R. 482), which shows that the Section is applicable to the case where the personal representative of the mortgagee is applying, the estate having gone to the heir-at-law of the mortgagee. The term "reconveyance" in the Section would obviously seem to point to a reconveyance to the mortgagor, but the case cited indicates that this is not strictly read. But the application of the Section to such a case as this is of small importance, since Section 30 of The Conveyancing Act, 1881, under which trust and mortgage estates devolve on the personal representative.

Under the former Act, if the mortgagee was illegitimate and died intestate a vesting order could be made, the petition having been served on the Crown (*re* Minchin's Estate, 2 W. R. 179).

If the mortgagee has taken possession, this Section does not apply. But in *re* Skitter (4 W. R. 791) the Court did, under Section 9 of the Trustee Act (replaced by Section 26 of this Act), make an order vesting in the executors of a deceased mortgagee in fee, who had died intestate as to trust estates, the legal estate outstanding in the heir-at-law out of the jurisdiction, though the mortgagee had before her death been in receipt of the rents. The Court did this on the ground that Section 9 authorised such a vesting order where any person "seised or possessed of *any lands upon any trust*" was out of the jurisdiction. Section 9 is replaced, as to this, by Sub-section ii. (B) of Section 26 of this Act (see note to that Section, *supra*, p. 106).

Under this Section a transfer of a mortgage could, no doubt, be effected, as the words are "the money due in respect of the mortgage has been paid to a person entitled to receive the same."

Sub-section (*e*).—A case of "uncertainty" under this Section arose under the following circumstances:—A mortgagee of freehold land died, having made a Will by which he appointed executors. The validity of the Will was disputed by the testator's widow, and an action to establish the Will had been commenced in the Probate Division, but had not yet been tried. The mortgage debt had been paid. It was held that it was "*uncertain*," within the meaning of this Sub-section, who was the personal representative of the deceased mortgagee, and that consequently the Court had jurisdiction to make an order vesting the mortgaged land in the mortgagor (see *in re* Cook's Mortgage [1895], 1 Ch. 700).

Vesting order consequential on judgment for sale or mortgage of land.

30. Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein [*as heir, or under the Will of a deceased person for payment of whose debts the judgment was given or order made*], and is a party to

the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person.

Section 30.—This Section is a re-enactment of Section 29 of 13 & 14 Vict. c. 60, and Section 1 of 15 & 16 Vict. c. 55.

The words within brackets and in italics in this Section were repealed by Section 1 of The Trustee Act, 1893, Amendment Act, 1894 (see *infra*, p. 167, for the Act).

This Section comes into operation whenever the Court makes an order "directing the sale or mortgage of any land."

Section 29 of 13 & 14 Vict. c. 60 only applied where the sale was for the payment of debts. Section 1 of 15 & 16 Vict. c. 55 remedied this by enacting that where a sale had been directed "for any purpose whatsoever" the power comes into effect. Although these words are not to be found in the Section under consideration, the meaning obviously is that it operates in any case.

Hence the powers conferred by it can be used where the sale has been to provide costs, thus rendering Weston *v.* Filer (5 De G. & Sm. 608) obsolete (see Wake *v.* Wake, 17 Jur. 545; and see also Hancox *v.* Spittle, 3 Sm. & Gif. 478).

There are two other variations introduced in the present Section. The Section begins "*Where any Court*"; the Sections replaced speak of "*any Court of Equity*"; while lower down in this same Section 30 the words are "*the High Court* may." When used with reference to England or Ireland, "High Court," by Sub-section 3 of Section 13 of The Interpretation Act, 1889, means Her Majesty's High Court of Justice in England or Ireland as the case may be. The other variation is the insertion of the words "or mortgage" in the second line of the Section, and "mortgagee" in the last. The repealed Sections did not include the case where the Court ordered a mortgage. To this extent, then, the law is altered.

"*Every person*" has been held to include persons under no disability, and who could have validly executed a conveyance of the property which it is desired to vest (Beckett *v.* Sutton, 19 Ch. D. 646), which case also decides that Section 1 of The Trustee Extension Act, 1852, and by analogy of reasoning this Section, applies to sales under The Partition Acts, 1868 and 1876. It also includes a lunatic not so found (Herring *v.* Clark, L. R., 4 Ch. 167).

The persons who may be declared trustees under this Section are—

1. Any person seised or possessed of or entitled to the land as heir.

2. Any person entitled to a contingent right therein as heir.

3. Any person seised or possessed of or entitled to the land under the Will of a deceased person for payment of whose debts the judgment was given or order made.

4. Any person who is a party to the action or proceeding.

5. Any person who is otherwise bound by the judgment or order.

The Court may vest the estate in the purchaser or mortgagee or in such other person as the Court thinks fit.

Hancox *v.* Spittle (3 Sm. & Giff. 478) was a case of vesting the land in "some other person."

Where the estate is sold in lots the purchasers can petition for a vesting order, and the costs of each purchaser are payable out of the purchase money of his lot (Ayles *v.* Cox, *ex parte* John Attwood, 17 Beav. 584).

Formerly applications under the Trustee Act had to be by petition; but now Order LIVB. of the Rules of the Supreme Court provides that applications under The Trustee Act, 1893, may be made by petition except as otherwise provided under Order LV. Order LIVB., as subsequently amended by later Rules, will be found in Appendix IV., Part A.

By Section 5 of 47 & 48 Vict. c. 71, Section 1 of the Trustee Extension Act is made to apply to sales (thereby authorised) of the hereditaments of the Crown in an action as if such hereditaments were vested in a subject.

This Section of the Trustee Extension Act is now repealed; but it is apprehended that the Court could under the present Act make a vesting order where it has made an order for sale coming within Sub-section 1 of Section 5 of 47 & 48 Vict. c. 71 (The Intestates' Estate Act, 1884).

Vesting order consequential on judgment for specific performance, &c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the Will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Section 31.—This Section is a virtual re-enactment of Section 30 of 13 & 14 Vict. c. 60, and Section 7 of 31 & 32 Vict. c. 40 (The Partition Act, 1868). As to appointing a person to execute documents see Section 14 of The Judicature Act, 1884.

The High Court can make a vesting order under this Section in the following cases:—

Where a judgment is given—

(*a*) For the specific performance of a contract concerning any land;

(*b*) For the partition of any land;

(*c*) For the sale in lieu of partition of any land;

(*d*) For the exchange of any land; or

(*e*) For the conveyance of any land, either in cases arising out of the doctrine of election or otherwise.

(*a*) A contract for the sale of leaseholds was held not to come within the Section replaced by this Section (Grace *v.* Baynton, W. N. [1877] 79); but in Hall *v.* Hale (51 L. T., N. S. 226) Kay, J., made an order appointing a person to execute the lease, and this decision will no doubt now be followed.

(*b*) Orders have been made under the former Act in partition actions in Bowra *v.* Wright (4 De G. & Sm. 256), *re* Molyneux (10 W. R. 512, the case of a lunatic), *re* Sherard (1 De G. J. & S. 421), and Shepherd *v.* Churchill (25 Beav. 21).

(*c*) This replaces Section 7 of The Partition Act, 1868 (31 & 32 Vict. c. 40), which Section is repealed by this Act.

(*e*) For instances of orders in foreclosure actions see Lechmere *v.* Clamp (31 Beav. 578) and Foster *v.* Parker (8 Ch. D. 147). As to the proper form of order in a foreclosure action where an infant heir-at-law of the mortgagor is party see Mellor *v.* Porter (25 Ch. D. 158).

The cases of Lees *v.* Coulton (L. R., 20 Eq. 20) and Basnett *v.* Moxon (L. R., 20 Eq. 182) show to what extent the Court can bind *unborn persons*, in which terms are included heirs of a living person.

What the Court does, in making the order, is either to declare that the persons in question "are trustees of the land," or to declare that "the interests of unborn persons who might claim under any party to the action, or under the Will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transaction concerned, are the interests of persons who, on coming into existence, will be trustees within the meaning of this Act." In Lees *v.* Coulton a form of order will be found.

Section 14 of The Judicature Act, 1884, under which the Court possesses somewhat similar powers to those conferred by this Section, is as follows:—"Where any person neglects or refuses to comply with a judgment, or order directing him to execute any conveyance, contract, or other document or to

endorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and in such case the conveyance, contract, document, or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it." This power was actually exercised in Owen *v.* Edwards (33 W. R. 578). *Re* Montagu, Faber *v.* Montagu ([1896] 1 Ch. 549), shows that where an order is made vesting or appointing a person to convey the estate of an infant tenant in tail in possession the effect is to bar the estate tail and remainders over.

The practice is now regulated by Order LIVB. (see Appendix IV., Part A., *infra*).

Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Section 32.—This Section in effect re-enacts Sections 7 to 15 of 13 & 14 Vict. c. 60, and Sections 1, 2, and 8 of 15 & 16 Vict. c. 55.

The effect of an order under this Section is to be—

1. As if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs; or
2. If there is no trustee, as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the Court directs.

For a case on this Section, showing the effect of a vesting order, see *re* Montagu, Faber *v.* Montagu ([1896] 1 Ch. 549).

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Section 33.—This Section re-enacts Section 20 of 13 & 14 Vict. c. 60.

The conveyance by the person appointed to convey should contain a recital showing it is made in obedience to the order of the Court (*ex parte* Foley, 8 Sim. 395; Caswell *v.* Sheen, 69 L. T., N. S. 854; and see also Judicature Act, 1884, Section 14).

Effect of vesting order as to copyhold.

34. (1) Where an order vesting copyhold land in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

Section 34.—This Section re-enacts Section 28 of 13 & 14 Vict. c. 60. It deals with two cases—

1. Where a vesting order of copyhold is made with the consent of the lord or lady of the manor.

2. Where an order is made appointing any person to convey any copyhold land.

1. In the first case, the consent of the lord or lady obviates the necessity of a surrender and admittance; but there is nothing to prevent the Court making an order without such consent, the effect then being to vest the property in the intended trustee, leaving it still necessary for him to obtain surrender and admittance, and this is what will usually happen. In such a case surrender is made and admittance obtained in due course on the proper fines being

paid. The lord cannot, however, claim two fines for admittance, one of the customary heir (if there be one), and another for the admittance of the trustee; but only one on the admission of the new trustee (Bristow *v.* Booth, L. R., 5 C. P. 80). If the lord will consent to the vesting order, he can signify his consent by writing. This is done usually by a verified certificate of such consent (Ayles *v.* Cox, *ex parte* John Attwood, 17 Beav. 584).

2. Where an order has been made appointing a person to convey, the customary assurance having been made, application will be made for admittance, which the lord or lady is bound to give, "subject to the customs of the manor and the usual payments."

The Section does not very distinctly lay down that a vesting order can be made without the consent of the lord or lady of the manor; but it is clear from the cases on Section 28 of the Act of 1850, which this Section replaces, that this can be done. The practice has been not to serve the lord with the petition for the vesting order, nor would it be necessary to so serve the petition or summons under the Section now being discussed. A vesting order made in *re* Hurst (cited in "Seton on Decrees," vol. ii., 5th edition, p. 1031), without the consent of the lord, renders it clear that the Court had such power under the Section replaced by this Section, on which the same construction will doubtless be put.

The procedure under this Section will be by summons. For Form of Summons for a Vesting Order of Copyholds see Form 5, Appendix V., and for Affidavit in support of the application see Form 6.

Vesting orders as to stock and choses in action.

35. (1) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(*a*) is an infant, or

(*b*) is out of the jurisdiction of the High Court, or

(*c*) cannot be found, or

(*d*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or

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(*e*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead,

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint:

Provided that—

(*a*) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the Court may appoint.

(2) In all cases where a vesting order can be made under this Section, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this Section according to its tenor.

(4) After notice in writing of an order under this Section it shall not be lawful for the Bank of England or

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of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Section 35.—This Section deals with the vesting of stock and choses in action and shares in ships, as the previous Sections have dealt with the vesting of land, and replaces Sections 20, 22, 23, 24, 25, 26, 31, and 35 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and Sections 3, 4, 5, and 6 of The Trustee Extension Act, 1852 (15 & 16 Vict. c. 55).

The expression "Stock," by the Definition Section (Section 50, *infra*), includes "*fully paid-up shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein.*"

The words "a trustee entitled alone or jointly with another person" will —as by Section 50, *infra*, "trust" includes the duties incident to the office of personal representative of a deceased person—cover the case of stock standing in the name only of a deceased person where his personal representative is out of the jurisdiction or not to be found, or where it is uncertain whether such personal representative is living or dead, or where such personal representative neglects or refuses to transfer (*re* Ellis, 24 Beav. 426).

The jurisdiction arises on the appointment of a new trustee by the Court, and also in certain cases where a trustee *is entitled alone* or *jointly* with another to stock or a chose in action.

Sub-section ii. (*a*)—*Where such Trustee is an Infant.*—This replaces Section 3 of The Trustee Extension Act, 1852. Under the repealed Section the Court has declared an infant beneficiary in whose name, jointly with another, funds are standing a trustee within the Section, but the Bank of England has refused with effect to act on such orders, and it is doubtful whether they are valid (see *re* Harwood, 20 Ch. D. 536; and *re* Findlay, 32 Ch. D. 220, and *ibid.* 641).

Sub-section ii. (*b*).—*Where such Trustee is Out of the Jurisdiction of the High Court.*—The Sub-section is general, and whether the trustee be an infant or lunatic the Section applies. As to what is "out of the jurisdiction" see Hutchinson *v.* Stephens (5 Sim. 499).

Sub-section ii. (*c*).—*Where such Trustee Cannot be Found.*—This means cannot be found after all reasonable efforts have been made to discover his whereabouts.

For cases where the Court exercised this jurisdiction, a trustee having absconded and the other three applying for a vesting order, see Dugmore *v.* Suffield (W. N. [1896] 50) and *re* Lees's Settlement Trusts ([1896] 2 Ch. 508).

Sub-section ii. (*d*).—Under this head are comprised various reasons for appointing a new trustee and vesting the property in him. These are—

(i.) Neglecting or refusing to transfer stock.

(ii.) Neglecting or refusing to receive dividends or income, or to sue or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing so to do.

The application cannot be served before the expiration of the twenty-eight days (*re* Knox's Trusts [1895], 1 Ch. 538).

"*The person absolutely entitled.*"—A tenant for life is "a person absolutely entitled" only when making an application with reference to the income; but persons appointed trustees are "absolutely entitled" (*re* Ellis's Settlement, 24 Beav. 426).

Sub-section ii. (*e*).—This Sub-section replaces Section 4 of The Trustee Extension Act, which was inserted in view of Mackenzie *v.* Mackenzie (5 De G. & Sm. 338). The procedure in this case might be by motion instead of by summons, as under the former practice it could be by motion instead of petition (*re* Holbrook's Will, 5 Jur., N. S. 1333), though a summons under the Rules of the Supreme Court, Order LV., Rule 2 (8), or a petition, as was the case in *re* Knox's Trusts ([1895] 2 Ch. 483), is the safer course. In this case trustees who held a residuary estate upon trust, in events which had happened, to divide the same among three sets of beneficiaries, were requested in writing by all such beneficiaries to transfer to them the various funds of which the residue consisted according to an arrangement which they had entered into. It appeared there was sufficient cash in the hands of the trustees to pay any outstanding costs which they might have to pay, but one of the two trustees refused to transfer for twenty-eight days after request. It was held that the Court had jurisdiction to make the vesting order, and to order the recusant trustee to pay the costs of the application (see also *re* Cathcart, 41 W. R. 277).

The Court being empowered to vest the right "in any such person as the Court may appoint," it has unlimited discretion, subject to the cases provided for in Provisoes (*a*) and (*b*) of the latter part of this Section. For forms of vesting order see "Seton on Decrees," 5th edition, pp. 1033 to 1039.

Proviso (*a*).—Where there were originally three trustees and one had disappeared the correct form of order to be made is that the right to call for a transfer, &c., do vest in the petitioner and [other trustee alone] as trustees of the [settlement],

and that they do transfer the sums of stock into their own names to be held by them upon the trust of the [settlement] (*re* Price, W. N. [1891] 169, 8 Rep. 621; following *re* Gregson, 2 R. 513).

Sub-section 2.—This portion of the above Section re-enacts the latter part of Section 20 of 13 & 14 Vict. c. 60.

Sub-section 3.—This Sub-section replaces Section 26 of The Trustee Act, 1850, and Section 6 of The Trustee Extension Act, 1852. In *re* Peacock (14 Ch. D. 212) the usual order was varied, as the funds were invested in unauthorised securities, the order being for the appointment of new trustees, with the right to call for a transfer of the funds to the trustees themselves, *or to any purchaser or purchasers*, the trustees undertaking to hold the proceeds on the trusts of the settlement (see *re* New Zealand Trust and Loan Co., W. N. [1892] 169, for remarks of the Court of Appeal on the proper form of order to adopt). *Re* Gregson ([1893] 3 Ch. 233) laid down that where the stock or shares with reference to which a vesting order is being made are Government or other stock or shares upon which there is no liability for calls, and which are to be held by the trustees, the order should, as a rule, go on to direct the persons in whom the right to transfer or call for a transfer, and to receive the dividends or income, is vested to transfer the stock or shares into their own names; but where shares are being dealt with on which there is a liability to calls such directions should be omitted. But it is competent for the Judge to make an order in either form according to the special circumstances.

Sub-section 4.—Upon obtaining such an order as in this Section mentioned a notice in writing should immediately be served upon the bank or other company, after which the bank or such company cannot transfer any stock or pay any dividend, except in accordance with the order.

Sub-section 5.—The Court could not, under Section 31 of 13 & 14 Vict. c. 60, which this Sub-section replaces, order the fund to be paid into Court (*re* Parby, 29 L. T. 72); but it could order the trustees to pay in the fund under the Trustee Relief Act (*re* Thornton's Trust, 9 W. R. 475).

Sub-section 6.—This Sub-section replaces Section 10 of 18 & 19 Vict. c. 91, which enacted as follows:—"Shares in ships registered under the said Merchant Shipping Act, 1854, shall be deemed to be included in the word 'Stock,' as defined by The Trustee Act, 1850, and the provisions of such last-mentioned Act shall be applicable to such shares accordingly."

Persons entitled to apply for orders.

36. (1) An order under this Act for the appointment of a new trustee, or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Section 36.—This Section, replacing Section 37 of 13 & 14 Vict. c. 60, deals with the procedure to be followed for obtaining such orders as are hereinbefore dealt with. An order appointing (i.) a new trustee, or (ii.) concerning any land, stock, or chose in action subject to a trust, may be made on the application—

(*a*) Of any person *beneficially interested* in the land, stock, or chose in action, whether under disability or not.

(*b*) On the application of any person *duly appointed trustee* thereof.

If an order is sought concerning any land, stock, or chose in action subject to a mortgage, then the application can be made by—

(i.) Any person *beneficially interested* in the equity of redemption, whether under disability or not.

(ii.) Any person *interested* in the money secured by the mortgage.

In the case of disability the usual mode of appearing by a person, *sui juris*, as next friend or committee has, of course, to be adopted.

As to the meaning of "beneficially interested," the following cases throw some light:—A person contingently entitled to a beneficial interest is "beneficially interested" (*re* Sheppard's Trust, 4 De G. F. & J. 423); so, too, a purchaser in a sale of the property under the order of Court is "beneficially interested" (Rowley *v.* Adams, 14 Beav. 130); creditors, plaintiffs in an action for the administration of the real and personal estate of the testator, are "beneficially interested" therein (*re* Wragg, 1 De G. J. & Sm. 356); but the committee of a lunatic *cestui que trust* is not (*re* Bourke, 2 De G. J. & Sm. 426).

Application under any of these Sections respecting the appointment of new trustees, and vesting the trust property in them, or in cases under the Sections re-enacting The Trustee Acts, 1850 and 1852, where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein, would be made by summons under the Rules of the Supreme Court, Order LV., Rule 13 (*a*), or by petition (as the case may be) under Order LIVB.

Powers of new trustee appointed by Court.

37. Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Section 37.—The effect of this Section is that all powers, whether legal or equitable, will vest in the new trustee or trustees, and be exerciseable by them. No such question can now arise as came up for decision in Newman *v.* Warner (1 Sim., N. S. 457), where it was held that a trustee appointed under the Court's ordinary jurisdiction could not exercise a legal power of sale. Under this Section, whether the trustee is appointed in an action, or in pursuance of a petition or summons under this Act, the trustee can exercise all the powers, legal and equitable, of the former trustees. The Section replaces Section 35 of 44 & 45 Vict. c. 41, which in its turn replaced the latter part of Section 27 of 23 & 24 Vict. c. 145 (Lord Cranworth's Act).

Power to charge costs on trust estate.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

Section 38.—Under this Section the costs and expenses *of and incident to* any such application or proceeding as mentioned in the Section can be ordered to be paid as the Court directs.

"*By such persons as to the Court may seem just.*"—These words would empower the Court to order a respondent to pay costs (see Sarah Knight's Will, 26 Ch. D. 82; *re* Primrose, 23 Beav. 590; *re* Adams, 12 Ch. D. 634), and to make a personal order as to costs (Sarah Knight's Will, *ubi supra*, and *in re* Mills's Estate, 34 Ch. D. 24).

The principles established by the cases decided on Section 51 of The Trustee Act, 1850, replaced by this Section, and which will no doubt be closely adhered to by the Court in construing and applying this Section, can be grouped as follows:—

1. Costs in cases relating to the appointment of new trustees.
2. Costs in cases of mortgagor and mortgagee.
3. Costs in cases of vendor and purchaser applications.

1. *Costs in Cases relating to the Appointment of New Trustees.*

As a general rule, the whole costs of and incidental to the application are payable by the *corpus* of the estate or the *cestui que trusts*, though preferably by the trust estate, unless there are special reasons for making them payable otherwise (*re* Parby, 29 L. T. 72; *re* Fulham, 15 Jur. 69; *re* Fellows's Settlement, 2 Jur., N. S. 62).

The case of Harvey *v.* Oliver (W. N. [1887] 149) is useful as showing what costs are properly allowed on the appointment of new trustees.

In some cases the costs are made payable by the petitioners, as in *re* Brackenbury's Trusts (L. R., 10 Eq. 45), where the reversioners, petitioning for the appointment of an extra trustee, were saddled with the costs of the application, there having originally been only one, but the petitioners desired two for their own protection. Fines payable on the admission of new trustees of copyholds were ordered to be paid rateably by the tenants for life and reversioners in proportion to their interests (Carter *v.* Sebright, 26 Beav. 374).

The new trustees have occasionally been ordered to pay the costs in the first place, which were to be a charge on the estate with interest (*ex parte* Davies, 16 Jur. 882).

Where new trustees of two funds were to be appointed the costs were ordered to be paid thereout rateably (*re* Grant's Trusts, 2 J. & H. 764).

If a trustee who has become bankrupt, and has been requested to retire, declines to do so, he will be removed at his own cost where a petition has been caused by his own obstinacy, unless the circumstances of his bankruptcy were such as to show that it arose from misfortune (*re* Adam's Trusts, 12 Ch. D. 634). This decision is of equal validity, though the procedure is now by summons. The decision in *re* Adam's Trusts somewhat detracts from the authority of *re* Primrose (23 Beav. 590), where it was decided that the Court had *no jurisdiction* to order a respondent whose conduct had caused the presentation of the petition to award costs against him; and this jurisdiction has been doubted by the Court as recently as the date of the decision in *re* Sarah Knight's Will (26 Ch. D. 82), where it was queried whether under the Judicature Acts and Order LXV., Rule 1, of the Orders of 1883, the Court has jurisdiction to order a respondent to a petition under The Trustee Act, 1850, to pay costs (see *re* Mills's Estate, 34 Ch. D. 24). It is apprehended, as stated above, that the Court has under the Section now being discussed such power, since the words are "to be borne and paid in such manner *and by such persons* as to the Court may seem just," which appears somewhat wider than the terms in the former Act. As a general rule, a trustee served and appearing on a petition to appoint new trustees will get his costs (Turner *v.* Mullineux, 9 W. R. 252). Richardson *v.* Grubb (16 W. R. 176) was a case of a trustee petitioner having to pay all the costs because he had unnecessarily presented a petition for the appointment of new trustees.

Re Primrose, cited above, was commented on by the Lord Chancellor in *re* Woodburn's Will (1 De G. & J. 346), where he says, "That was a case in which a stranger was served with the petition: what jurisdiction could there be to make him pay costs unless the Act in terms gave it?"

The costs can be directed to be raised by mortgage of the property (*re* Crabtree, 14 W. R. 497).

2. *Costs in Cases of Mortgagor and Mortgagee.*

The rule as between mortgagor and mortgagee is that the mortgagor must bear the costs of obtaining a reconveyance of his property (King *v.* Smith, 6 Ha. 473). Where the representative of the mortgagee is an infant, the mortgagor must pay the costs of a petition occasioned by such infancy (*ex parte* Ommaney, 10 Sim. 298); and also if the mortgagee devised the

estate, instead of allowing it to descend, the mortgagor had still to pay the costs of a petition to get in the legal estate. This latter event cannot now happen, since Section 30 of The Law of Property and Conveyancing Act, 1881, enacts that the legal estate in mortgaged or trust realty of all kinds other than copyholds shall go to the personal representative of the mortgagee or trustee. Copyhold property is dealt with by Section 88 of The Copyhold Act, 1894, and descends to the customary heir.

Where a mortgagee has become lunatic the general rule, that the costs occasioned by necessary applications to get in the legal estate will come out of the mortgagor's pocket, is still the same (*re* Jones, 2 De G. F. & J. 554; *re* Marrow, Cr. & Ph. 142; *re* Stuart, 4 De G. & J. 317, which contains a full statement of the principle guiding the Court; but see, *contra, ex parte* Richards, 1 J. & W. 264, and *re* Townsend, 2 Ph. 348). But should the petition be presented by the representatives of the lunatic mortgagee—especially if the mortgagee be beneficially interested in the moneys—the costs then come out of the lunatic's estate (*re* Wheeler, 1 De G. M. & G. 434; *re* Biddle, 23 L. J., Ch. 435; *re* Thomas, 22 L. J., Ch. 858). In *re* Viall, Hawkins *v.* Perry (8 De G. M. & G. 439), part of the costs were ordered to be paid by the mortgagee's estate. If the mortgagor is served, he is not entitled to his costs (*re* Phillips, L. R., 4 Ch. 629).

If, in addition to being a mortgagee, such mortgagee is a trustee, the case is still clearer for making the mortgagor, or his estate, bear such costs (*re* Fulham,. 15 Jur. 69; *re* Lewes, 1 M. & G. 23, where the existence of the trust appeared on the face of the mortgage). But where the trust did not appear, the costs were ordered to come out of the trust estate (*re* Jones, 2 Ch. D. 70).

In *re* Sparks (6 Ch. D. 361) each party was left to pay his own costs, as the mortgagee was of unsound mind, but *not so found*, the Court considering that it had no jurisdiction to order the costs to be paid out of the mortgage debt.

James, L. J., in that case considered the question of the jurisdiction conferred by the Act, and came to the conclusion that the Court could only order costs to be paid out of the lands or personal estate in respect of which the application is made. The Section of the present Act now under consideration is, as has been pointed out, somewhat wider in terms, allowing the Court to order the costs to be borne and paid, not only in such manner (which the former Act did), but by *such persons* as might seem just to it.

As to what costs a solicitor-mortgagee will be allowed see Field *v.* Hopkins (44 Ch. D. 524), and also Eyre *v.* Wynn-Mackenzie ([1894] 1 Ch. 218). In the latter case it was held that a solicitor-mortgagee cannot, in the absence of express agreement, charge the mortgagor with any profit costs, either for work done in respect of the mortgaged property as solicitor for the mortgagor, including the preparation of the mortgage to himself, or where the mortgage is of a life interest, or collecting, receiving, and distributing the income as agent for the mortgagor: but *semble* this rule does not preclude a partner of the solicitor-mortgagee from receiving remuneration for his trouble (*in re* Doody [1892], 1 Ch. 129). To meet the apparent hardship created by these

decisions The Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), was passed. The material Sections of this Act are as follows:—

2. (1) Any solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm in negotiating the loan, deducing and investing the title to the property, and preparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor and such person had retained and employed such solicitor or firm to transact such business and do such acts, and such charges and remuneration shall accordingly be recoverable from the mortgagor.

(2) This Section applies only to mortgages made after the commencement of this Act.

3. (1) Any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage, or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

(2) This Section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.

4. In this Act the expression "mortgage" includes any charge on any property for securing money or money's worth.

5. This Act shall not extend to Scotland.

3. *Costs in Cases of Vendor and Purchaser Applications.*

The general rule in cases between vendor and purchaser is that the costs of procuring a person to convey under the Trustee Acts must be borne by the vendor, and, in general, the costs of an application to the Court under those Acts, and therefore presumably under this Act, to complete the title must be so borne (Bradley *v.* Munton, 16 Beav. 294), in which case, by the contract, the costs occasioned by getting a person appointed to surrender were to be paid by the purchaser.

Where property is sold in lots, the vendor must pay for the costs of a petition to the Court out of the purchase money of the particular lots, and not out of funds standing to the general credit of the cause (Ayles *v.* Cox, *ex parte* John Attwood, 17 Beav. 584).

Where a person has entered into a contract to sell land, and dies, leaving an infant heir, and an action is brought to have the infant declared a trustee, the rule appears to be that each party must pay his own costs. But where the vendor has devised, the costs would be borne by his estate, as it is not by the mere act of God that the estate has got into another person, necessitating an order for its re-transfer (Purser *v.* Darby, 4 K. & J. 41); and see further on this point *re* Lowry's Will (L. R., 15 Eq. 78) and *re* Manchester and Southport Railway Co. (19 Beav. 365).

But cases of vesting orders being required as between vendor and purchaser will not be of such frequent occurrence as formerly, in consequence of Section 4 of The Conveyancing Act, 1881, which is in these terms:—

4. (1) Where at the death of any person there is subsisting a *contract enforceable* against the heir or devisee for the sale of the *fee simple* or *other freehold interest* descendible to his heirs general in any land, his *personal representative* shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2) A conveyance made under this Section shall not affect the beneficial rights of any person claiming under any testamentary disposition as heir or next-of-kin of a testator or intestate.

(3) This Section applies only in cases of death after the commencement of this Act (31*st December*, 1881).

Lysaght *v.* Edwards (2 Ch. D. 506) shows that to make a vendor a trustee the contract must be enforceable against both parties at the death of the vendor.

Trustees of charities.

39. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

Section 39.—This Section re-enacts Section 45 of 13 & 14 Vict. c. 60, and empowers the Court to vest the property of charities in the new trustees thereof.

The power conferred by the Section under the former Act was exercised in the case of *re* Norton Folgate (cited in "Seton on Decrees," vol. i., 4th edition), and also in *re* Basingstoke School (see same place).

The words of this Section are wide, applying in all cases where the High Court would have jurisdiction over a charity or society upon action duly instituted.

It makes no difference, either, whether the appointment of the trustee was—

1. By instrument under a power; or
2. By the High Court itself.

Orders made upon certain allegations to be conclusive evidence. 53 & 54 Vict. c. 5.

40. Where a vesting order is made as to any land under this Act or under The Lunacy Act, 1890, or under any Act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order; but this Section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

Section 40.—This Section is a re-enactment of Section 44 of 13 & 14 Vict. c. 60, and Section 140 of 53 & 54 Vict. c. 5, and prevents a vesting order made by the Court under the powers conferred by the Act being invalid by reason merely of the allegation upon which it was made being untrue; but the Section empowers the Court to direct a reconveyance when it thinks fit, and to make orders as to costs occasioned by any order improperly obtained.

Application of vesting order to land out of England.

41. The powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland.

Section 41.—The corresponding Section of 13 & 14 Vict. c. 60, Section 54, was not in quite the same terms, the words being "the dominions, plantations, and colonies belonging to Her Majesty (except Scotland)," the words in the Section now under consideration being "in Her Majesty's dominions"; but this makes, it is apprehended, no material difference. Cases where lands were in Ireland and Canada occurred while the former Act was in force, and the Court under Section 54 made orders (*re* Hewitt's Estate, 6 W. R. 537; *re* Tait's Trusts, W. N. [1870] 257; *re* Schofield, 24 L. T. 322; *re* Groom, 11 L. T., N. S. 336; and see *re* Lamotte, 4 Ch. D. 325).

The powers conferred on the High Court in England by this Section are now extended to the High Court in Ireland by The Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), which, by its second Section, enacts as follows:—"The powers conferred on the High Court in England by Section 41 of The Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions, except Scotland, are hereby also given to and may be exercised by the High Court in Ireland."

Payment into Court by Trustees.

Payment into Court by trustees.

42. (1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust may pay the same into the High Court; and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the moneys or securities so paid into Court.

(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into Court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into Court, and every transfer, payment, and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Section 42.—In considering this Section the definition of *Trustee* must be borne in mind. By Section 50 the expression "Trust" does not include the duties incident to an estate conveyed by way of mortgage (see further pp. 132 and 160, *infra*, as to the circumstances under which a mortgagee may become a trustee); but, with this exception, the expressions "Trust" and "Trustee" include implied and constructive trusts, and the duties incident to the office of personal representative of a deceased person.

The Section in question (Section 42) replaces 36 Geo. III. c. 52, Section 32; 10 & 11 Vict. c. 96, Sections 1 and 2; 11 & 12 Vict. c. 68; and 12 & 13 Vict. c. 74, Section 1.

This repeal and re-enactment may give rise to some difficulty, for it was held, previous to the passing of the Act, that payment into Court under the Trustee Relief Act of an infant's fund made that infant a ward of Court, whereas a similar payment under 36 Geo. III. c. 52 did not have that effect. The reason for this distinction does not appear to be very clear, and as by the Section of The Trustee Act, 1893, now under discussion no distinction exists as to the provisions under which the money is paid in, it is difficult to see how the Court will decide the question, unless regard be had to the fact that the foundation of the jurisdiction as to an infant becoming a ward of Court is that the infant is a British subject, not that it possesses property under the control of the Court (Brown *v.* Collins, 25 Ch. D. 60), and that in every case the Court has a discretion (*ibid.* at p. 62; see also *re* Hillary, 2 Dr. & S. 461; De Pereda and De Mancha, 19 Ch. D. 451). This seems the solution of the difficulty, namely, that the Court will consider the circumstances in each case.

The subject matter of the Section may, for convenience of dealing with it, be subdivided thus:—

(A) Who may pay trust money into Court.

(B) How payment into Court is made.

(A) *Who may Pay Trust Money into Court.*

"*Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust.*"

Thus it is quite clear that trustees, whether on express, implied, or constructive trusts, and also the personal representatives of a deceased person, whether executors or administrators, can avail themselves of this procedure.

A few examples of trusteeship which enables the holder of money to avail himself of this Section may here be given.

Sub-section 6 of Section 25 of The Judicature Act, 1873, is in these terms:—"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the *debtor trustee or other person* from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always that if the debtor trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be

entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Act for the Relief of Trustees."

Hence a *debtor trustee or other person* within the meaning of this Section can adopt the mode of acting indicated by Section 42 of The Trustee Act, 1893, and pay the money in his hands into Court.

The owner of an estate charged with a sum in favour of another is not a trustee within the Act (*re* Buckley, 17 Beav. 110; and Cox *v.* Cox, 1 K. & J. 251, 254).

An insurance company may, since the Judicature Act above quoted, as they are debtors in respect of the funds, pay them into Court, thus rendering Matthew *v.* Northern Assurance Co. (9 Ch. D. 80) obsolete law, but there being some doubt as to this, 59 & 60 Vict. c. 8 has been passed, setting at rest any difficulty for life assurance companies. This Act is set out at the end of this note, and also the Rules which have been issued thereunder.

For a case where a mortgagee had availed himself of the provisions as to payment into Court contained in the repealed Acts see *in re* Walhampton Estate (26 Ch. D. 391); and it seems clear that in certain circumstances a mortgagee does become a trustee within the meaning of this Act, as, for example, when he has realised by sale the property and paid his own debt and costs. Indeed, the repealed Act, 10 & 11 Vict. c. 96, Section 1, actually had the words "all trustees *or other persons.*" These latter words do not reappear in the Section of this Act now under discussion; but the definition of "trust" and "trustee" is clearly wide enough to include a mortgagee in such a position as indicated (see also Charles *v.* Jones, 35 Ch. D. 544, and especially p. 550, as to the position and rights of a stakeholder).

It had been decided that a mortgagee who has sold under his power was within the meaning of the Section replaced by this one (Roberts *v.* Ball, 1 Jur. N. S. 586); but a bank which has received notice of conflicting claims respecting a deposit in its hands is not a trustee (*re* Sutton's Trusts, 12 Ch. D. 175).

The power of trustees to pay in applies to "*money or securities belonging to a trust.*"

"*Securities,*" by Section 50, includes stocks, funds, and shares, and, *so far as relates to payments into Court*, has the same meaning as in The Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44). By Section 3 of that Act the term "securities" includes Government securities and any security of any foreign State, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom, and all stocks, funds, and effects.

Of course the Court can give such directions as it thinks fit as to whether the securities shall be retained in their original form, or sold and re-invested differently, and probably would do so in proper cases. The last clause of Sub-section 1 of Section 42, "and the same shall, subject to Rules of Court, be dealt with according to the orders of the High Court," seems to cover such circumstances. The Supreme Court Funds Rules, 1894, deal with funds paid into Court (see *infra*, Appendix IV., Part B.).

(B) *How Payment into Court is Made.*

The practice on payment into Court of trust funds has, by Rules of Supreme Court, Trustee Act, 1893, Order LIVB., Rule 4, been assimilated to what it was previously to the case of *re* Graham's Trusts ([1891] 1 Ch. 51). Accordingly, when a trustee or other person desires to lodge funds in Court in the Chancery Division under The Trustee Act, 1893 (see Rules of the Supreme Court, Trustee Act, 1893, Appendix IV., Part A.), he must annex to the affidavit to be filed by him pursuant to the said Rule a Schedule in the same printed form as the Lodgment Schedule to an Order setting forth—

(*a*) His own name and address.

(*b*) The amount and description of the funds proposed to be lodged in Court.

(*c*) The ledger credit in the matter of the particular trust to which the funds are to be placed.

(*d*) A statement whether legacy or succession duty (if chargeable), or any part thereof, has or has not been paid.

(*e*) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be inserted in any, and what, description of Government securities, or whether it is deemed unnecessary so to invest the same.

An office copy of such Schedule is to be left with the Paymaster.

Under the present practice the affidavit must shortly describe the nature of the trust, and give the names of the persons interested in the fund (*re* Waring, 16 Jur. 652). For Form of Affidavit see Appendix V., Form 10, *infra*.

The money is (under the practice hitherto in force) paid to the account of the Paymaster-General "in the matter of the particular trust, describing the same by the names of the parties as accurately as may be for the purpose of distinguishing it" (see the repealed Section 10 of 10 & 11 Vict. c. 96, and also Appendix V., Forms 11 and 12). On this point the cases of *re* Jervoise (12 Beav. 209) and *re* Joseph's Will (11 Beav. 625) may be referred to. Where different trusts affect aliquot parts of the fund, the parts ought to be paid in to separate accounts.

Notice of payment in is given to the persons interested by sending them registered letters. For Form of Notice see Appendix V., Form 13, *infra*.

Where the money paid in belongs to a lunatic (so found) the Court can order payment to the Poor Law Guardians for the maintenance of the lunatic. If not so found, the Court can still order maintenance (*re* Upfull's Trust, 3 McN. & G. 281; *re* Burke, 2 De G. F. & J. 124).

Payment into Court was a procedure much resorted to by trustees desirous of ascertaining the persons entitled to a fund; but it should not, under the present practice, be indiscriminately resorted to (see the cases of *re* Woodburn's Will, 1 De G. & J. 333; *re* Cater's Trust, 25 Beav. 361; *re* Giles, 34 W. R. 712;

and "Daniell's Chancery Practice," p. 2080); for now, on summons under Order LV., Rule 3 (*b*), trustees can have the opinion of the Court as to the persons interested in a fund by taking out an originating summons (*re* Giles, 34 W. R. 712).

Sub-section 2.—"*The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the moneys or securities so paid into Court.*"—The receipt or certificate is a discharge only to the extent of the funds paid in (Beaty *v.* Curson, L. R., 7 Eq. 194). The payment is in effect a retirement of the trustees from their office, and they can no longer exercise their powers as trustees (*re* Nettlefold's Trusts, W. N. [1888] 120).

Costs.—The costs of the trustees incident to the payment in, if not disputed, can be deducted; but if there is any difference about them, it is the proper course to pay in the whole, and apply for payment when any application is made by a person interested about the fund with reference to it (Beaty *v.* Curson, L. R., 7 Eq. 194). But the Court cannot order repayment of costs improperly deducted on payment in. Where an application is being made for payment out, a separate proceeding must be instituted to recover the excess (*re* Parker's Will, 39 Ch. D. 303).

Payment Out of Court.—Payment out or any application with reference to the fund where the money or securities in Court do not exceed £1000, or £1000 nominal value, should now be made by summons under Order LV., Rule 2 (2), (4), and (5), or even if the fund exceeds that amount where the case comes under Order LV., Rule 2 (1): that is, where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity, or the birth, marriage, or death of any person (*re* Broadwood, 55 L. J., Ch. 646).

Under Order LIVB., Rule 4 (*a*), applications to deal with funds lodged in Court under the Act are to be intituled in the same manner as the affidavit or request on which the funds were lodged. For Form see *infra*, Appendix V., Form 14.

Sub-section 3.—"*Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the High Court*" *&c.*—This Sub-section is a re-enactment of 12 & 13 Vict. c. 74, and under it the procedure was by way of petition (see *re* Broadwood's Trust, 8 L. T., N. S. 622).

"And where any such moneys or securities are deposited with any *banker, broker, or other depositary*, the Court may order payment or delivery of the moneys or securities *to the majority of the trustees* for the purpose of payment into Court."—Under this clause the banker, broker, or other depositary has to transfer the money to the trustees, who then pay it into Court.

The provision at the end of the Section that "every transfer, payment, and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or

delivered," evidently means that the depositaries would be no longer liable for the fund, whatever happens, after it has passed from them to the trustees.

General Jurisdiction to order Payment into Court.—It must not be lost sight of that the Court has inherent jurisdiction in a pending action, when an admission has been made of trust funds being in the hands of a party, to order such funds into Court, and this jurisdiction is recognised in Order LII., Rule 6, of the Rules of the Supreme Court (see Hollis *v.* Burton [1892], 3 Ch. 226). An admission to ground such an application for payment in may be—

1. By a pleading (Hetherington *v.* Longrigg, 10 Ch. D. 162).
2. By not controverting an affidavit (Freeman *v.* Cox, 8 Ch. D. 148).
3. A verbal admission proved by an uncontroverted affidavit (*re* Beeny [1894], 1 Ch. 499).
4. An admission by an agent or other person acting in the interest of the defendant (London Syndicate *v.* Lord, 8 Ch. D. 84, which contains a valuable discussion as to this jurisdiction on p. 90).

In London Syndicate *v.* Lord, *supra*, Jessel, M. R., said, "It has been held in the Court of Chancery for many years that an admission by an accounting party of a sum being due is sufficient to ground an order upon him to pay the sum into Court. There is not, so far as I know, any virtue in one mode of admission rather than in another. What the Court has to be satisfied of is that the defendant has admitted the amount to be due. At one time it was supposed that the admission must be in an answer, and no doubt that was the practice of the Court of Chancery before decree. It was next settled that it need not be in the answer, but that it might be in an affidavit brought in by the defendant, or in an answer to a question which he could not help answering on an examination taken by direction of the Master. Whether it was a compulsory statement on oath or a voluntary statement on oath was immaterial, because it need not be on oath at all. A man may admit by his agent or solicitor that the sum is due; he may put in a formal admission to that effect without any oath whatever; or he may act in such a manner as to authorise a third person to admit for him. He may say 'I will admit that to be due which my accountant finds to be due. I will delegate to an accountant for me and on my behalf the right of stating the account for me, and I will admit that that is correct.' There is no difficulty in doing that, and if the Court ascertains he has done it, the Court will act on the admission."

There is power given by Section 70 of The County Courts Act, 1888, to trustees to pay trust moneys not exceeding £500 in amount into the Post Office Savings Bank of the district. The procedure to be followed is that laid down in the County Courts Acts (see "Annual County Courts Practice"; and also Section 46 and notes thereon, p. 149, *infra*).

Life Assurance Company.—The Life Assurance Companies (Payment into Court) Act, 1896, now regulates the payment of life policy moneys into Court, and is as follows:—

AN ACT TO ENABLE LIFE ASSURANCE COMPANIES TO PAY MONEY INTO COURT IN CERTAIN CASES. [21*st May*, 1896.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as The Life Assurance Companies (Payment into Court) Act, 1896.

2. In this Act—

The expression "life assurance company" means any corporation, company, or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies.

The expression "life policy" includes any policy not foreign to the business of life assurance.

3. Subject to Rules of Court any life assurance company may pay into the High Court, or where the head office of the company is situated within the jurisdiction of the Chancery Court of the County Palatine of Lancaster either into that Court or into the High Court, any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.

4. The receipt or certificate of the proper officer shall be a sufficient discharge to the company for the moneys so paid into Court, and such moneys shall, subject to Rules of Court, be dealt with according to the orders of the High Court or the Palatine Court as the case may be.

5. This Act does not extend to Scotland.

Since the passing of the Act the following Rules dealing with the procedure under it have been issued:—

LIFE ASSURANCE COMPANIES (PAYMENT INTO COURT) ACT, 1896.

RULES OF THE SUPREME COURT.

1. An assurance company desiring to make a payment into Court under the Act shall cause an affidavit by its secretary or other authorised

officer to be filed, intituled "In the matter of the Policy No. effected with [*here give the name of the company*] and in the matter of the Act," and setting forth—

(*a*) A short description of the policy and a statement of the persons entitled thereunder, according to the terms of the policy, with the names and addresses of such persons, so far as the same are known to the company.

(*b*) A short statement of the notices received by the company claiming an interest in or title to the money assured, the dates when such notices were received, the dates of withdrawal of such notices, if any, as have been withdrawn, and the names, and except as to notices withdrawn the addresses, so far as the same are known to the company, of the persons by whom such notices have been given.

(*c*) A statement that, in the opinion of the board of directors of the company, no sufficient discharge can be obtained otherwise than by payment into Court under the Act.

(*d*) The submission by the company to pay into Court such further sum, if any, whether for interest or otherwise, as the Court or a Judge may direct, and to pay any costs which the Court or a Judge may consider under the circumstances of the case ought to be paid by the company.

(*e*) An undertaking by the company forthwith to transmit to the Paymaster any notice of claim received by the company after the making of the affidavit, with a letter referring to the title of the affidavit.

(*f*) The place where the company may be served with any petition, summons, order, or notice of any proceeding relating to the money.

2. The company shall not deduct any costs or expenses of or incidental to the payment into Court.

3. No payment shall be made into Court under the Act where any action to which the company is a party is pending in relation to the policy or the moneys thereby assured, except by leave of the Judge, to be obtained by summons in the action.

4. The company shall forthwith give notice of such payment, by prepaid letter through the post, to the several persons appearing by the affidavit to be entitled to or interested in the money assured and paid into Court, or to have given notice of claim to the company, except where the notice has been withdrawn, and except so far as the name or address of any such person is unknown to the company.

5. Any person claiming to be entitled to or interested in the money paid into Court may apply in the Chancery Division by petition, or, where the amount does not exceed £1000, by summons in respect thereof.

6. No petition or summons relating to the money shall be answered or issued unless the applicant has named therein a place where he may be served with any petition or summons or notice of any proceeding or order relating to the money.

7. Unless the Court or a Judge shall otherwise direct, the applicant shall not, except when he asks for payment of a further sum or costs by the the company, serve such petition or summons on the company, but shall serve the same on or give notice thereof to every person appearing by the affidavit on which payment into Court was made to be entitled to, or interested in, or to have a claim upon the money, or who has given any further notice which has been transmitted to the Paymaster as aforesaid.

8. These Rules shall come into operation on the 1st day of August, 1896.

9. These Rules may be cited as The Rules of the Supreme Court (Life Assurance Companies), 1896.

The following additional Rule has been added to The Supreme Court Funds Rules, 1894:—

SUPREME COURT FUNDS RULES, 1894.

Where a company desires to lodge money in Court under The Life Assurance Companies (Payment into Court) Act, 1896, there shall be annexed to the affidavit directed to be made by Order LIVc., Rule 1, of the Rules of the Supreme Court, or any substituted Rule, a Lodgment Schedule stating the title and address of the company, the amount of the money proposed to be lodged, and the ledger credit to which it is to be placed. Such ledger credit shall be as follows, with any necessary variations:—"In the matter of the Policy No. of the Company." An office copy of the Schedule is to be left with the Paymaster.

On receipt by the Paymaster of any subsequent notice of claim transmitted by such company pursuant to their undertaking referred to in Sub-section (*e*) of the said Rule, he shall retain the same, and make an entry thereof in his books; and on any certificate of the fund to which such notice refers, he shall notify the name of the person giving such notice and the date hereof.

The Paymaster shall also, upon such request as is mentioned in Rule 100, and upon payment of the same fee as is payable for a transcript under that Rule, supply a copy of such notice.

Miscellaneous.

Power to give judgment in absence of a trustee.

43. Where in any action the High Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the action and give judgment therein against that person in his character of a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

Section 43.—This is, in effect, a re-enactment of Section 49 of 13 & 14 Vict. c. 60, that Section being repealed by the present Act (see Section 51 and Schedule).

As to the practice under the repealed Section see Westhead *v.* Sale (6 W. R. 52) and Burrell *v.* Maxwell (25 L. T., N. S. 655).

"Action" is defined under Section 100 of The Judicature Act, 1873 (36 & 37 Vict. c. 66), as being a "civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by the Crown."

A proceeding commenced by originating summons, where prescribed by the Rules of the Supreme Court, is an action within the above definition (*re* Fawsitt, Gallan *v.* Burton, 30 Ch. D. 231; and see Lack *v.* Pearce [1893], 2 Ch. 271, and *re* Holloway [1894], 2 Q. B. 163).

Power to sanction sale of land or minerals separately.

44. (1) Where a trustee [or other person] is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2) Any such trustee [or other person], with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to

time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this Section shall derogate from any power which a trustee may have under The Settled Land Acts, 1882 to 1890, or otherwise.

Section 44.—This Section in effect, so far as trustees are concerned, replaces Section 2 of 25 & 26 Vict. c. 108, which Act is wholly repealed by the present Act (see Section 51 and Schedule).

Section 2 of the repealed Act extended not only to trustees, but to every other person authorised to dispose of land by way of sale, and these words were held to include mortgagees (*re* Beaumont's Mortgage Trusts, L. R., 12 Eq. 86; *re* Wilkinson's Mortgaged Estates, L. R., 13 Eq. 634; *re* Hirst's Mortgage, 45 Ch. D. 263).

The effect of the total repeal of Section 2 of 25 & 26 Vict. c. 108 would, it was apprehended, be to deprive mortgagees of the power of obtaining the sanction of the Court to a sale of land and minerals separately, for the word "trustee" in this Section of the present Act could hardly be taken to include a mortgagee with power of sale. Accordingly, Section 3 of The Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), provides that "In Section 44 of The Trustee Act, 1893, after the word 'trustee' in the first two places where it occurs shall be inserted the words 'or other person.'"

Section 19 of The Conveyancing and Law of Property Act, 1881, confers on a mortgagee, where the mortgage is made by deed, a power to sell the mortgaged property, or any part thereof, when the mortgage money has become due. It is apprehended, however, that the words "or any part thereof" apply only to a sale of a separable part of the mortgaged property in the state in which it was subjected to the mortgage (*re* Yates, Batcheldor *v.* Yates, 38 Ch. D. 112, 121, 128), and that where a mortgagee is desirous of selling minerals apart from the surface an application under this Section for sanction of the High Court is necessary.

It was the practice of the Court under the repealed Act to make an order authorising the sale of land reserving the minerals, or of the minerals apart from the land, without reference to any particular sale (*re* Willway's Trusts, 32 L. J., Ch. 226).

It will be observed that the power conferred by this Section may be negatived by the instrument creating the trust or direction to sell.

The application for an order under this Section should apparently be made by petition (see Form 15, Appendix V.)

Order LIVB. of the Rules of the Supreme Court provides that all applications under The Trustee Act, 1893, may be made by petition, except as otherwise provided by Order LV. Order LIVB., Rule 3, says an application under Section 44 of this Act may be made by "the trustees authorised to dispose of the land" as in the said Section mentioned.

There is no specific indication in the Section of the mode of application, but only of the person by whom it can be made.

Power to make beneficiary indemnify for breach of trust.

45. (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This Section shall apply to breaches of trust committed as well before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the Twenty-fourth day of December, One thousand eight hundred and eighty-eight, and is pending at the commencement of this Act.

Section 45.—This Section makes a useful and important extension in the law as administered in the Courts of Equity before the passing of The Trustee Act, 1888 (51 & 52 Vict. c. 59), of which it replaces Section 6.

By virtue of it a trustee, or person claiming under him, will now be able to claim to be idemnified by a beneficiary against the consequences of a breach of trust where the breach has been committed—

1. At the instigation or request of the beneficiary, or
2. With the consent in writing of the beneficiary,

by having the beneficiary's interest impounded in whole or in part, and this, too, even where the beneficiary is a married woman entitled for her separate use, and whether with or without restraint on anticipation (but see below as to trustee's position when the beneficiary is a married woman restrained from anticipation, Bolton *v.* Curre [1895], 1 Ch. 544, at p. 551). The Court, however, has a full discretion to give or withhold this indemnity, and the claim to it will not be granted *ex debito justitiæ*. The Section applies to all breaches of trust committed as well before as after the passing of the Act, provided there was no action or other proceeding pending on 24th December, 1888, and still pending on 1st January, 1894, with respect to the breach in question (Sub-section 2).

The effect of this Section can be most conveniently seen by referring to the law as it stood before The Trustee Act, 1888. It is clear that beneficiaries who have not been parties or privy to a breach of trust concurred in or instigated by another beneficiary could impound that other beneficiary's interest in the trust fund which may have accrued either directly or derivatively (Irby *v.* Irby, 25 Beav. 632; Jacubs *v.* Rylance, L. R., 17 Eq. 341), or derived from some other estate comprised in the same settlement (Woodyatt *v.* Gresley, 8 Sim. 180), to compensate the trust estate for the loss for which the beneficiary is responsible.

The law is not altered on this head by this Act. The whole purview and intention of this enactment is succinctly stated in Bolton *v.* Curre (*ubi supra*) by Romer, J., as follows:—"In my opinion Section 6 of the Act of 1888 [replaced by the Section now under discussion] was intended to enlarge the power of the Court as to indemnifying trustees, and to give greater relief to trustees, and was not intended, and did not operate, to curtail the previously existing rights and remedies of trustees, or to alter the law, except by giving greater power to the Court. The discretion given to the Court by Section 6 as to whether it will impound or not is a judicial discretion, and if, prior to the passing of that Act, the Court would, in a proper case, enforce the equity of the trustee, and impound the interest of a beneficiary in the hands of an assignee, then the Court would be bound to do the same in a similar case after the Act. The equity of the trustee existed as much since the Act as before; and if the Court before the Act thought fit in a proper case to enforce that equity by impounding, it will equally, since the Act, think fit to enforce the equity in a similar case and impound."

Where a beneficiary has instigated and concurred in a breach of trust committed by a trustee, the right of the trustee against the beneficiary for indemnity under the law as it existed prior to The Trustee Act, 1888, may be considered under two heads—

(A) Where the beneficiary is not himself a co-trustee of the fund.

(B) Where the beneficiary is a co-trustee.

(A) The rule was that the defaulting trustees who had been made liable had a right to be indemnified to the extent to which the concurring beneficiary in question had benefited by the breach of trust. One of the earliest cases is Trafford *v.* Boehm (3 Atk. 440), where Lord Hardwicke lays down the rule in these terms: "If a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." This is not strictly accurate, as subsequent cases show that the trustee would be primarily liable, but with a right of indemnity over against the concurring beneficiary to the extent to which the latter had benefited by the breach. This was the rule adopted in Booth *v.* Booth (1 Beav. 125), where the M. R. said: "If she (the widow who was entitled to a life interest in one moiety of trust funds) has obtained any benefit from the breach of trust, the trustee ought to be compensated in respect of it."

The true rule is explicitly laid down in Raby *v.* Ridehalgh (7 De G. M. & G. 104), which is the leading case on the subject. In that case a breach of trust had been committed by the trustees, who had invested on insufficient security at the instance and request of the life tenants, who had received a higher rate of interest in consequence. Lord Justice Turner, in the course of the case, remarked: "Has the Court, in a suit of this nature, ever gone the length of ordering the *cestui que trust* personally to recoup the trustee?"

In giving judgment he said: "It seems to me to be the natural consequence of the *cestui que trustent* for life having received the income of the trust fund

unduly invested, that the trustees have a right to be indemnified as against the *cestui que trustent* for life or their estates to the extent to which those estates have been benefited by the improper investment," and he dissented from the judgment in the Court below, which made the tenants for life liable to recoup the trustees the whole sum they had been ordered to pay in respect of the loss occasioned by the breach of trust.

(B) Where the beneficiary who had concurred in the breach was also a co-trustee, the other co-trustees had a lien on his interest in the trust funds to recoup to them a proportionate share of the amount paid by them to make good the loss sustained by the trust estate (Prime *v.* Savell, W. N. [1867] 227). The rule to be applied where one of the trustees is also a *cestui que trust* and has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, is that the trustee who is a *cestui que trust* must indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received.

In Birks *v.* Micklethwaite (33 Beav. 409) the M. R. said: "When two trustees are jointly and severally liable to make good a trust fund, the plaintiff may recover the whole from either of them, and the one who pays the whole is entitled to contribution as against the other; and if there is any fund in Court in the suit which is payable to the latter, it is the daily practice to apply to the Court to impound the fund, in order to make good what is due from him."

Cotton, L. J., in Bahin *v.* Hughes (31 Ch. D. 390, at p. 395), after remarking that there were very few cases in which one trustee who has been guilty with a co-trustee of breach of trust, and held answerable, has successfully sought indemnity as against his co-trustee, and while declining to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, pointed out that so far as the cases had gone relief had only been granted against a trustee who had himself got the benefit of the breach of trust, or between whom and his co-trustees there had existed a relation which would justify the Court in treating him as solely liable for the breach of trust; but those observations, it is apprehended, only apply to cases where one defaulting trustee is endeavouring to claim total immunity by making his co-trustee liable for the whole loss.

The law has since the 24th of December, 1888, been, and in future under this Act will be, that a beneficiary who has instigated, requested, or consented in writing to a trustee committing a breach of trust, whether the beneficiary has benefited or not, and whether he is himself a co-trustee or not, will be liable to recoup the trustee or his co-trustee, as the case may be, to the whole extent of the beneficiary's interest in the fund; and if he has benefited by the breach, the indemnity is not confined merely to the amount of any benefit which he may have so received, subject always, however, to the discretion of the Court as to how far the indemnity should extend.

"*Such order as to the Court shall seem just for impounding*" *&c.*—There have been two decisions by the Court with reference to the extent of this discretion. In Ricketts *v.* Ricketts (64 L. T., N. S. 263) Romer, J., would not

give the trustee the benefit of the indemnity, because in that case he must be taken to have been aware he was committing a breach of trust. This decision is dealt with at more length below. The other case was a decision of Kekewich, J. (Griffith *v.* Hughes [1892], 3 Ch. 105). There the defendant was trustee for a married woman without power of anticipation. In February, 1884, she applied to and requested the defendant to advance to her out of the trust estate the sum of £80, stating that the advance would save her home from being sold up, as she and her husband were being pressed for payment of debts amounting to that sum. There was no document in writing signed by her instigating, requesting, or consenting to the payment. Under these circumstances the trustee was ordered to pay the £80 into Court, but with a right to resort by way of indemnity to the income payable to the beneficiary on the point of the extent of the discretion of the Court. Kekewich, J., said (p. 108): "I think that if a Statute gives the Court power to protect a trustee from loss, when, without moral dishonesty, he has committed a breach of trust for the benefit of other persons standing on a footing of equality with himself as regards knowledge of the facts which constitute the breach of trust, and who, therefore, are not in a position to blame him for his conduct—I think, I say, that when the Statute enables that to be done if the Court shall think fit, the Court naturally leans towards exercising the power in favour of the trustee."

In Ricketts *v.* Ricketts, R. was entitled absolutely in remainder to the trust funds of his mother's marriage settlement, which she had appointed to him by deed, subject to her own life interest. By his own marriage settlement R. covenanted to pay £10,000 to his trustees within six months after his mother's death, and in case of his death in his mother's lifetime that his executors should pay his trustees during his mother's life £400 per annum, to be applied as if it were income of the £10,000. R. took the first life interest under his settlement, with remainder to his wife for life. R. assigned to his trustees, as security, the trust funds of his mother's settlement. The trustees of the mother's settlement had notice of the assignment. R. having become embarrassed, the trustees of the mother's settlement were induced, on the entreaty of R., his mother, and his wife, to apply a large portion of the trust funds in discharge of R.'s debts. The trustees of R.'s settlement brought an action against the trustees of the mother's settlement for breach of trust, claiming that they might replace the funds. The defendants counterclaimed (*inter alia*) that the interest of R. and his wife in the funds might be impounded and declared liable to indemnify them.

Romer, J., decided that R. and his wife were not, in respect of their interests under settlement, beneficiaries under the settlement of his mother, and that the trustees of the latter were not entitled to have his and his wife's interest under the former impounded under Section 6 of The Trustee Act, 1888. It is true (the Judge went on to say) that, even if he did regard those interests of R.'s wife such as to make her a "*beneficiary in the trust estate*" under the mother's settlement, he would not have been justified in impounding that interest by way of indemnity, "seeing that the defendants committed their breach of trust, not owing to any misrepresentation or deceit on her part, but with their eyes open, when they must be taken to have known that her interest could not be validly dealt with." This was not necessary

for the decision of the case, and must, it is submitted, be regarded as an *obiter dictum*, and not to have too much importance attached to it since Griffith *v.* Hughes ([1892] 3 Ch. 105), cited and commented on above. In Bolton *v.* Curre ([1895] 1 Ch. at p. 551), Romer, J., commented on his lordship's own decision in Ricketts *v.* Ricketts in these terms, "I desire to say a word about my decision in the case of Ricketts *v.* Ricketts, which appears to have been misunderstood. I did not intend to lay down, and I did not in fact lay down in that case, any general rule that a trustee who knowingly committed a breach of trust could never have his beneficiary's interest impounded. What I considered in that case was that one of the facts to be borne in mind by the Court, when asked to exercise its discretion, is whether the breach of trust was committed by the trustee knowingly; and in that case seeing that the trustee acted knowingly, and having regard to the other circumstances of the case, I refused to remove the restraint on anticipation of the married woman's interest in order to give a security to the trustee. I adhere to what I said then; and in my judgment it is the duty of a trustee to protect a married woman against herself when she, as a beneficiary restrained from anticipation, asks him to commit a breach of trust."

"*At the instigation or request or with the consent in writing of a beneficiary.*"—Hitherto it has been at least doubtful whether the mere consent of a beneficiary to a breach was sufficient to bind that beneficiary's interest, and certainly it would not be so bound if the beneficiary were a married woman. In Sawyer *v.* Sawyer (28 Ch. D. 595), where trustees had sold out trust funds with the consent of a husband and wife, who took life interests under the settlement, and in breach of trust advanced the proceeds to the husband, he and his wife giving joint and several promissory notes to secure the amounts so advanced, which were eventually lost, the trustees claimed a right to retain the income of the property subject to the trust, in order to recoup themselves for the money which they were liable to repay in respect of the breach of trust. Chitty, J. (see p. 598), drew a distinction between *instance* or *request*, and *consent*. He said: "I hold that the law is, that for the trustees to be entitled to the order which they now ask against the estate for life, it must be shown that the breach of trust was committed at the instance and request of the *cestui que trustent*. I make no distinction between 'instance' and 'request,' but it must be shown clearly that the breach of trust was instigated by them, and that they were acting and moving parties in it." It was held that Mrs. Sawyer's interest could not be impounded to recoup the trustees.

The L.JJ. before whom the case came on appeal said: "Before a trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should show that the charge or right of retainer was created by her with a full knowledge of all the circumstances. It is probable that in the case of a man of full years the Court would presume him to be so acting; but in the case of a *feme coverte* we do not think the presumption exists in favour of the trustee, whose primary duty was to protect the fund for her benefit."

By the Section now under consideration a distinction is drawn between "instigation or request" and "consent," since the latter has to be "in writing" to bind the beneficiary. That the "instigation" or "request" need not be in

writing is clear from the ordinary grammatical construction of the phrase, and this has been decided to be the proper construction by Kekewich, J., in Griffiths *v.* Hughes ([1892] 3 Ch. at p. 105).

On p. 109 Kekewich, J., said: "It is common ground that there is nothing here in writing. It is equally common ground that the payment was made at the request of the married woman who is the beneficiary. Is that request, which was presumably by parol only, no writing having been proved, sufficient to bring the case within the statute? I have no doubt that the Section might be read grammatically, 'At the instigation in writing or request in writing, or with the consent in writing': that is to say, so as to make the words 'in writing' govern or apply to all the three antecedents. But I think that that would be somewhat crabbed language, and I do not think that one can suppose the draftsman intended that; though, no doubt, to repeat the words 'in writing' three times over, as I have just done by way of explanation, would be extremely awkward. . . . Therefore, finding, as I think I do, that there may be good ground for the distinction between a consent which is to be given in writing and an instigation or request which need not be in writing, and seeing that grammatically the Section will certainly bear the construction which I think ought to be given to it, I hold that the words 'in writing' apply only to consent, and are not applicable to instigation or request. In the present case, therefore, the trustee will have to pay the £80 into court, but will be entitled to resort by way of indemnity to the income payable to the married beneficiary."

Practically, where the impulse to commit the breach of trust for which the trustee is seeking indemnity from the beneficiary has emanated from the latter, evidence of a parol instigation or request will be sufficient; while on the other hand, where the breach of trust is suggested by one beneficiary or a trustee, and another beneficiary has merely consented thereto and is not actually benefited by the breach—as, for instance, if he is a remainderman—written evidence of such consent by the latter is necessary. The consent may probably be given in any form, so long as it is in writing.

The case of *re* Somerset's Settlement Trusts, Somerset *v.* Earl Poulett ([1894] 1 Ch. 231), throws considerable light on this Section, and shows that even where a beneficiary may have instigated, requested, and consented in writing to an unauthorised investment, it is necessary to show that he did it with full knowledge of the facts, and that where trustees had made an investment on an insufficient security with the consent of a beneficiary, and it was not shown that he requested that it should be made without due inquiry into the sufficiency of the security, his interest could not be impounded to make good to the trustees the amount they had to replace. In other words, in order to make a beneficiary liable under this Section, it must be shown not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust. The facts shortly were as follows:—On the marriage of one V. S., in 1875, property was vested in four trustees for V. S. and his wife for their lives, and then to be divided among their children. The property was at the time invested in

stocks and shares, which were worth some £35,000. Soon after his marriage, V. S. was anxious that these securities should be realised, and the proceeds invested on a mortgage of Lord Hill's Hawkstone estate in Shropshire. The trustees entertained the proposal, and employed a valuer of eminence to value the property. He estimated it at £42,750, and the trustees in 1878 ultimately advanced to Lord Hill the whole of the trust funds. In point of fact the valuation was much too high: the land only produced an income of about a thousand pounds, not enough to pay the interest on the mortgage, and even if correct it would not, according to the settled rule, have warranted the trustees in advancing more than two-thirds of the amount, or £28,500. Down to 1890 the interest on the mortgage was regularly paid, but then it ceased, and it was discovered that the security was deficient. Practically, part of the trust estate was gone, though the exact loss had not been ascertained. This was an action by V. S., charging the three surviving trustees with breach of trust, and claiming that they should make good the deficiency.

The defendants set up the Section of The Trustee Act, 1888, relating to the limitation of actions against trustees, and claimed (in the event of being held liable) to impound the life interest of V. S.

Lord Justice Lindley said that the first question raised by the appeal was whether the Statute of Limitations was a bar to the claim of V. S. to have the trust money made good, and there was also the question whether the trustees were entitled to be indemnified out of the plaintiff's life interest. The breach of trust for which the trustees were liable was the investment of trust money amounting to £35,000 upon the mortgage of the Hawkstone estate, in Shropshire, belonging to Lord Hill. The advance was made in August, 1878, and the mortgagor paid the interest to the plaintiff as tenant for life till August, 1890. The action was brought in February, 1892, more than six years after the investment, but considerably less than six years after the last payment of interest. Upon the first point the appeal, in his opinion, failed. As to the second, it was clear that the appellant *instigated, requested, and consented in writing to the investments; but the evidence did not show that he requested that it should be made without due inquiry into the sufficiency of the security. Whether the appellant knew at the time that the income of the estate was not, as had been stated,* £1,700 *but* £1,070 *a year, was a very important question.* Mr. Justice Kekewich found that he did know it, and that the life interest of V. S. ought to be impounded to make good to the trustees the amount they would have to replace; but the evidence did not, in his (Lord Justice Lindley's) opinion, warrant that conclusion. For these reasons he was unable to concur with the judgment of the Court below upon the second point, and the order must be varied accordingly. The result would be that the appellant would receive the income created by the trust fund, but he would not receive any personal benefit from what the trustees had to make good.

In Bolton *v.* Curre ([1895] 1 Ch. 544) a trustee's right to indemnity was held to take priority over a subsequent incumbrancer. The rate of interest chargeable against a trustee on a breach of trust is still four per cent.; but the question has been raised whether this rule should not be revised in view of the existing cheapness of money (Owen *v.* Richmond, W. N. [1895] 29).

"*Notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation.*"—This enactment affords one more instance of an Act of Parliament having been necessary to enable the Court to deal with its own creation, the restraint upon anticipation of the income of a *feme coverte*, as to which Malins, V.-C., in Stanley *v.* Stanley (7 Ch. D., at p. 591), remarked, "In no case and by no device whatever can the restraint upon anticipation be evaded." This power was exercised in Griffiths *v.* Hughes ([1892] 3 Ch. 105), but not in Ricketts *v.* Ricketts (as to which see note above).

As pointed out above, it is the duty of a trustee to protect a married woman restrained from anticipation against herself when she asks him to commit a breach of trust, and if he knowingly commits a breach of trust at her request, the Court will be slow to remove the restraint on anticipation in order that her life interest may be impounded to recoup him (Bolton *v.* Curre [1895], 1 Ch. 544).

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), Section 39, gave the Court power, when it appeared to be for the benefit of a married woman, to bind her interest in any property, even though she were restrained from anticipation; but this power is of course never exercised in the case of a breach of trust committed or concurred in by her.

Generally, on the mode in which the Court will exercise its discretion of removing the restraint on anticipation see *re* Little, Harrison *v.* Harrison (40 Ch. D. 418), which shows that the discretion will be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised because it will be for the benefit of the married woman. For a case where the Court declined to remove the restraint, there being nothing to shew that the married woman knew that the improper dealing with the funds was a breach see Mara *v.* Brown (W. N. [1895] 75).

Procedure.—Where the trustee who has committed the breach of trust and the beneficiary against whom he claims indemnity are already parties as defendants to an action brought in respect of the breach, Order XVI., Rule 55, of the Rules of the Supreme Court applies (*per* Chitty, J., in Sawyer *v.* Sawyer, 28 Ch. D. 595, at p. 601).

As to Form of Order in such an action see Butler *v.* Butler (14 Ch. D. 329, at p. 334).

In *re* Gilson, Gilson *v.* Gilson, where the persons from whom a trustee desired to obtain indemnity under this rule were one of the plaintiffs and a third person not a party to the action, North, J., held that the case did not fall within Order XVI., Rule 48, as the plaintiff (one of the persons to be served) was a party to the action, and also on the ground that the application was premature. Apparently the proper course in such a case would be to wait until after the delivery of the defence, and then to serve the third party with a notice under this rule, and the person who is a party already with notice under Order XVI., Rule 55.

If the beneficiary who has benefited is not already a party to the action, the "Third Party Procedure," under Order XVI., Rules 48 to 54, would, it is

apprehended, be applicable (Sawyer *v.* Sawyer, *ubi supra*), being by analogy an authority to this effect (see also *re* Harrison, Smith *v.* Allen [1891], 2 Ch. 349).

In Wynne *v.* Tempest ([1897] 1 Ch. 110), a claim brought by third party notice against the partners of his deceased co-trustee, who had misapplied a fund, was held not enforceable in this manner, but only by a new action.

Where a trustee claims contribution from a co-trustee time does not begin to run as between the co-trustees until the claim of the *cestui que trust* has been established against one of them (Robinson *v.* Harkin, W. N. [1896] 72 [15]).

For Form of Notice to be served under Order XVI. see Bahin *v.* Hughes (31 Ch. D. at p. 392), and Appendix V., Form 16.

Jurisdiction of palatine and county courts.

46. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

Section 46.—This Section replaces Section 11 of 17 & 18 Vict. c. 82 (The Court of Chancery of Lancaster Act, 1854), and Section 8 of 52 & 53 Vict. c. 47 (The Palatine Court of Durham Act, 1889), and also a portion of Section 21 of 13 & 14 Vict. c. 60 (The Trustee Act, 1850). This enactment would not, it is apprehended, permit the County or Palatine Court to make orders in lunacy (*re* Ormerod, 3 De G. & J. 249).

The High Court.—By The Interpretation Act, 1889, "High Court," when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland as the case may be.

Cases Within the Jurisdiction of a Palatine Court.—The Palatine Courts which have jurisdiction in trust matters are the Courts of Chancery of the County Palatine of Durham and of the County Palatine of Lancaster.

By Section 16 of The Judicature Act, 1873, the jurisdiction of the Court of Common Pleas at Lancaster and at Durham was vested in the High Court of Justice, leaving the Chancery jurisdiction still vested in them, except in the matter of appeals in Lancaster, which jurisdiction is vested in the Court of Appeal (see Judicature Act, 1873, Section 18, Sub-section 2).

As to the Palatine Court of Durham, The Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), amends and regulates the practice and proceedings therein. Section 8 of that Act, which authorised the Palatine Court to exercise all the powers and authorities under The Trustee Act, 1850, is repealed by this Act (The Trustee Act, 1893: see Schedule), but the Section now under discussion replaces it.

The procedure and practice in the Court of Chancery of the County Palatine of Lancaster is dealt with in The Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23).

Section 3 of that Act enacts that the Court of Chancery of the County Palatine shall, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction and in a similar manner and subject to the same restrictions in all respects as the High Court in its Chancery Division now has and exercises, or may under or by virtue of any Act of Parliament hereinafter passed, and not expressly enacting to the contrary hereof, have and exercise in respect of all persons, bodies corporate, and property within its jurisdiction.

Cases Within the Jurisdiction of a County Court—

(A) *As to County Courts in England.*

The County Courts Act, 1888 (51 & 52 Vict. c. 43), consolidated and extended the provisions of the former County Courts Acts. The County Court jurisdiction in matters the subject of The Trustee Act, 1893, is defined in Sections 67 and 68 of The County Courts Act, 1888, which (omitting immaterial provisions) are as follows:—

67. The Court shall have and exercise all the powers and authority of the High Court in the actions or matters hereinafter mentioned: that is to say—

(2) For the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds:

(5) Under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts in which the trust estate or fund to which the action or matter relates shall not exceed in amount or value the sum of five hundred pounds.

In all such actions or matters the Judge shall, in addition to the powers and authorities possessed by him, have all the powers and authorities, for the purposes of this Act, of a Judge of the Chancery Division of the High Court, and the Treasurer, Registrar, and the High Bailiff respectively shall in all such actions or matters discharge any duties which an officer of the said division can discharge, either under the order of a Judge of the said Division, or under the practice thereof, and all officers of the Courts shall in discharging such duties conform to any rules or orders made in that behalf under this Act.

It will be noticed that the former part of this Section says that the County Court "shall have and exercise all the powers and authority of the High Court . . . under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts." These Acts are practically repealed by The Trustee Act, 1893; hence the question arises, "Has the County Court jurisdiction in trust matters where the trust estate or fund to which the action relates shall not exceed five hundred pounds?" It is clear that the jurisdiction cannot be said to exist by virtue of the words "or under any of such Acts," because The Trustee Act, 1893, is obviously not any of such Acts, but the jurisdiction is preserved by Section 46 of The Trustee Act, 1893. That Section seems to contemplate the application of the provisions of The Trustee Act, 1893, to the County Court jurisdiction

as it existed at the time of the passing of the Act, at which period the County Court had jurisdiction up to a certain limit under the County Courts Act. In any event Section 38 of The Interpretation Act, 1888, would seem to save the jurisdiction of the County Courts, and, by virtue of it, in construing Section 67 of The County Courts Act, 1888, the references to the Trustees Relief Acts and the Trustee Acts must, it is submitted, be read as referring to The Trustee Act, 1893. Section 38 of the Interpretation Act enacts that "where this Act or any Acts passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions repealed." This view has in fact been upheld in an unreported case within the knowledge of the present Editors, where a vesting order of a trust fund under five hundred pounds in value was made under this Act by a Judge of a County Court.

The following Section of The County Courts Act, 1888, deals with the limits of the jurisdiction of the County Court:—

68. If during the progress of any action or matter under the last preceding Section it shall be made to appear to the Judge that the subject matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any order already made, but it shall be the duty of the Judge to direct the action or matter to be transferred to the Chancery Division of the High Court, and the whole of the procedure in the said action or matter when so transferred shall be regulated by the Rules of the Supreme Court: Provided always that it shall be lawful for any party to apply to a Judge of the said Division at Chambers for an order authorising and directing the action or matter to be carried on and prosecuted in the County Court, notwithstanding such excess in the amount of the limit to which equitable jurisdiction is given by the said Section; and the Judge, if he shall deem it right to summon the other parties, or any of them, to appear before him for that purpose, after hearing such parties, or in default of the appearance of all or any of them, shall have full power to make such order.

The County Court Rules, 1889, provide for the administration of trusts (within the limits of the County Court jurisdiction) and the determination of questions relating to trust funds within the same limits (see County Court Rules, 1889, Order III., Rules 17 *et seq.*; Order VI., Rule 6; and Order XXII., Rule 11; and "The Annual County Courts Practice, 1897," vol. i., p. 472). These Rules also provide for the payment of trust funds into Court (see "The Annual County Courts Practice, 1897," vol. i., p. 475, and Order XXXVIII). The following are the Sections of The County Courts Act, 1888, dealing with this subject:—

70. Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise upon trusts within the meaning of the Trustees Relief Acts, where the same do not exceed in

amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, with the Registrar of the Court within the district of which such persons or any of them shall reside of an affidavit shortly describing according to the best of their knowledge the instrument creating the trust, may, in the case of money, be paid into a Post Office savings bank established in the town in which the Court is held in the name of the Registrar of such Court, in trust to attend the orders of the Court, and upon such persons filing with the Registrar the receipt or other document given to them by the officer of the said bank, the Registrar shall record the same and give to them an acknowledgment in such form as may be prescribed, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and in the case of stocks or securities may be transferred or deposited into or in the names of the Treasurer and Registrar of such Court in trust to attend the orders of the Court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited, and for the above purposes all the powers and authorities of the High Court shall be possessed and exercised by the Courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order.

71. Any money paid into Court in the actions or matters mentioned in the last four preceding Sections shall, unless otherwise ordered by the Judge, be invested by the Registrar in his name as Registrar, within forty-eight hours of its payment into Court in a Post Office savings bank established in the town in which the Court is held, without restriction as to amount and without the declaration required of a depositor in a savings bank, and no part of any money invested in a Post Office savings bank under this Act shall be paid out to any Registrar, except upon an authority addressed to the Postmaster-General by the Treasury.

Any person deriving any benefit under any moneys paid into a Post Office savings bank under the provisions of this Act may, nevertheless, open an account in a Post Office savings bank, or in any other savings bank, in his own name, without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

By Sub-section 2 of Section 75 proceedings under The Trustee Acts, 1850 and 1852, shall be taken in the Court within the district of which the persons or person making the application, or any of them, reside or resides.

As to the procedure generally in trust matters in the County Courts see "The Annual County Courts Practice, 1897," vol. i., p. 462 *et seq.*

(B) *As to County Courts in Ireland.*

The County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), confers jurisdiction on the Civil Bill Courts in Ireland. See Sections 33 (*b*) and (*i*), 34, 35, 36, 37, 38, 39, and 40 (*f*).

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

Application to trustees under Settled Land Acts of provisions as to appointment of trustees.

47. (1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of The Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2) This Section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3) This Section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act, otherwise than under the provisions of The Conveyancing and Law of Property Act, 1881. 44 & 45 Vict. c. 41.

Section 47.—This Section replaces Section 17 of The Settled Land Act, 1890 (53 & 54 Vict. c. 69), such last-mentioned Section being repealed by the present Act.

The repealed Section was enacted for the purpose of meeting the case of *re* Wilcock (34 Ch. D. 508), in which it was doubted whether Section 31 of The Conveyancing and Law of Property Act, 1881 (which Section is now repealed and replaced by Section 10 of the present Act), applied to trustees appointed for the purposes of the Settled Land Acts.

Neither the tenant for life nor a person who might become tenant for life ought to be appointed a trustee of a settlement for the purposes of the Settled Land Acts, for one of the duties of the trustees is to check the proceedings of the tenant for life (*re* Harrop's Trusts, 24 Ch. D. 717, 719); and on the same grounds the solicitor of the tenant for life ought not to be appointed (Wheelwright *v.* Walker, 23 Ch. D. 752, 763; and *re* Kemp's Settled Estates, 24 Ch. D. 485). It is undesirable that near relatives should be appointed trustees for the purposes of the Act, for there ought to be two independent trustees (*re* Knowles's Settled Estates, 27 Ch. D. 707).

For Form of Appointment of a New Trustee under the Settled Land Acts see *infra*, Appendix V., Form 17.

In the case of *in re* Simpson, *in re* Whitchurch ([1897] 1 Ch. 256), it was held by the Court of Appeal that the Court had jurisdiction under the Settled Land Act to appoint Colonial trustees, and that the persons proposed ought to be appointed, according to the form in *re* Wright's Trusts (24 Ch. D. 662), trustees of the settlement for the purposes of The Settled Land Act, 1882; but very special circumstances must exist to induce the Court to do this.

Sub-section 2.—It will be observed that the Section is to have a retrospective effect, and makes valid appointments, discharges, and retirements of trustees made under The Conveyancing Act, 1881, before this Act came into operation.

Trust estates not affected by trustee becoming a convict. 33 & 34 Vict. c. 23.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of The Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict: provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

Section 48.—This Section replaces Sections 46 and 47 of The Trustee Act, 1850 (13 & 14 Vict. c. 60), which Sections are repealed by the present Act (see Section 51 and Schedule).

The repealed Sections were almost identical in their terms with Sections 3 and 5 of 4 & 5 Will. IV. c. 23, which Act was repealed by The Trustee Act, 1850.

By The Forfeiture Act, 1870 (33 & 34 Vict. c. 23), it is enacted that after the passing of that Act (4th July, 1870) no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in that Act shall affect the law of forfeiture consequent upon outlawry. By Section 9 the Crown is empowered to appoint an administrator of the convict's property, and the Act makes provision for the vesting of the convict's property in the administrator for all the convict's estate and interest therein, and also makes provisions as to the mode in which such property is to be applied.

By Section 6 of The Forfeiture Act, 1870, the expression "convict," as used in the Act, is to be deemed to mean any person against whom, after the passing of the Act, judgment of death or penal servitude shall have been pronounced or recorded upon any charge of treason or felony.

Outlawry in civil proceedings is abolished by 42 & 43 Vict. c. 59, Section 3.

As to the power of the Court to appoint a new trustee in substitution for a trustee who is convicted of felony, and to make a vesting order on the appointment of such new trustee, see Sections 25, 26, and 32 of the present Act.

49. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the Court by which it was made had jurisdiction to make the same. Indemnity.

Section 49.—This Section is supplemental to Sections 35 and 42 of the present Act, and in effect replaces 11 & 12 Vict. c. 68, 12 & 13 Vict. c. 74, and Section 7 of 15 & 16 Vict. c. 55.

50. In this Act, unless the context otherwise requires— Definitions.

The expression "bankrupt" includes, in Ireland, insolvent: "Bankrupt."

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent: "Contingent right."

Section 50.—"*Contingent right.*"—This definition is taken from the definition of "contingent right" in Section 2 of 13 & 14 Vict. c. 60, which definition was in its turn taken from 8 & 9 Vict. c. 106, with the purpose, no doubt, of including all the estates and interests over which that Act gives a power of disposition.

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts "Convey" and "Conveyance."

to be performed by married women and tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries in England and Ireland respectively, and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land:

"*Convey*" *and* "*Conveyance.*"—See 13 & 14 Vict. c. 60, Section 2, and 44 & 45 Vict. c. 41, Section 2 (v.), Tenants-in-tail. So, where there was an adult tenant for life with infant tenant in tail, a vesting order of the infant's estate with the consent of the tenant for life as protector to bar the entail will pass the estate (Powell *v.* Matthews, 1 Jur. N. S. 973). As to copyholds see Rowley *v.* Adams (14 Beav. 130).

The effect of these words in an order appointing a person to convey the estate of an infant tenant in tail is to bar the estate tail and remainders over (*re* Montagu, Faber *v.* Montagu [1896], 1 Ch. 549, which contains an order showing the correct form).

"Devisee." The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description:

"*Devisee*"—See 13 & 14 Vict. c. 60, Section 2.

"Instrument." The expression "instrument" includes Act of Parliament:

"Land." The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land:

"*Land.*"—"Land," by The Interpretation Act, 1889, Section 3, includes messuages, tenements, and hereditaments, houses and buildings *of any tenure*, and, in addition, includes, when used in this Act, manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land. Leaseholds, consequently, would be within this definition, since it includes messuages, tenements, &c., *of any tenure*. As "land" includes incorporeal hereditaments, it would, it is conceived, extend to rent charges. See *re* Harrison (Seton, 4th edition, 516); and see also 13 & 14 Vict. c. 60, Section 2, and 44 & 45 Vict. c. 41, Section 2 (ii.) and (iv.).

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee: "Mortgage" and "Mortgagee."

"*Mortgage*" and "*Mortgagee*" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee. This definition may be compared with that contained in The Conveyancing and Law of Property Act, 1881, of "Mortgage," as it no doubt comprises the same extent of rights. In that Act "mortgage includes any charge on any property for securing money or money's worth; and mortgage means money or money's worth secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee."

There appears to be no doubt that, according to the true interpretation of this Section, equitable mortgages are comprised in it (see also and compare 13 & 14 Vict. c. 60, Section 2).

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connection with the expression "into court" include the deposit or transfer of the same in or into court: "Pay" and "Payment."

"*Pay*" *and* "*Payment.*"—These expressions occur in Section 42, dealing with "Payment into Court by Trustees." Trustees who have "money or *securities* belonging to a trust may pay the same into the High Court"; and by Sub-section 3 of the same Section the High Court "may order *payment* into Court"; and, as interpreted by this Section, the securities can, without change of investment, be deposited in Court, or transferred if they are in such investments as are authorised by law for trustees.

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any land: "Possessed."

"*Possessed.*"—See and compare 13 & 14 Vict. c. 60, Section 2, and 44 & 45 Vict. c. 41, Section 2 (iii.)

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not: "Property."

"*Property*" includes—(*a*) Real property; (*b*) Personal property; (*c*) Any estate and interest in any property, real or personal; (*d*) Any debt; (*e*) Any thing in action; (*f*) Any other right or interest, in possession or not.

Where the word "property" occurs in the Act, it must, however, be taken in conjunction with the context, and construed accordingly. In Section 5, Sub-section 1 (*a*), for instance, the word "property" apparently applies only to real estate.

This definition reproduces that contained in 44 & 45 Vict. c. 41, Section 2 (i.), and 45 & 46 Vict. c. 39, Section 1, Sub-section 4 (i.).

It is scarcely necessary to further comment on the terms here used, except to say that a debt is a species of "things in action," and means the right of suing for money due.

By Sub-section 6 of Section 25 of 36 & 37 Vict. c. 66, any debt or legal chose in action is assignable by writing if the assignment is absolute, and express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action.

"Rights." The expression "rights" includes estates and interests:

"Securities." The expression "securities" includes stocks, funds, and shares; and so far as relates to payments into court has the same meaning as in The Court of Chancery (Funds) Act, 1872:

35 & 36 Vict. c. 34.

"*Securities.*"—See and compare 44 & 45 Vict. c. 68, Section 2, and 35 & 36 Vict. c. 44.

Section 3 of The Court of Chancery (Funds) Act, 1872, is as follows:—"The term 'Securities' includes Government securities, and any security of any foreign State, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom, and all stocks, funds, and effects."

"Stock." The expression "stock" includes fully paid-up shares; and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein:

"*Stock.*"—See and compare 52 & 53 Vict. c. 32, Section 9, and 13 & 14 Vict. c. 60, Section 2.

The definition of "stock" with relation to vesting orders would apparently include shares in a joint stock banking company (*re* Angelo, 5 De G. & Sm. 278), an annuity with a life assurance society (see *re* Tweedy, 28 Ch. D. 529, 531), and also shares in ships registered under The Merchant Shipping Act, 1854 (18 & 19 Vict. c. 91), Section 10.

The word "stock" in The Trustee Act, 1850, and The Trustee Extension Act, 1852, was held in *re* New Zealand Trust and Loan Co. ([1893] 1 Ch. 403; see also [1893] 3 Ch. 233) to include shares in a limited company, whether fully paid up or not. Mr. Justice Lindley (see p. 410) said: "In the first place he says that Section 35 of The Trustee Act, 1850, does not apply to shares not fully paid up. . . I have known orders made under the Act, with regard to shares not fully paid up for the last thirty years. . . . I cannot help thinking, however, looking at Section 2, that the language is ample enough to comprise shares not fully paid up. In *re* Angelo (5 De G. & Sm. 278) it was held that the definition of the word 'stock' in Section 2 applied to 'shares' in a joint stock company; but I do not know that the point now taken up by the appellants has arisen before for decision with regard to shares not fully paid up. I should say that the practice of making orders under the Act extending to shares not fully paid up is well founded; and, in my opinion, that objection is untenable." As Section 2 of The Trustee Act, 1850, is replaced by this Section, the same construction will doubtless be given to the word "stock." The word also obviously covers all descriptions of Consols, as they are securities "transferable in books kept by any company or society."

"*Any company.*"—It is apprehended that these words would not extend to a foreign company which does not carry on its business here, nor to a Scotch company (see Section 41, *supra*).

"Transfer."

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

"*Transfer.*"—See and compare 13 & 14 Vict. c. 60, Section 2, and 15 & 16 Vict. c. 55, Section 6.

"Trust" and "Trustee."

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception, the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person.

"*Trust*" *and* "*Trustee.*"—The expression "Trustee" has, for the purposes of the Act, three meanings assigned to it: viz.—

1. An Express Trustee.
2. Personal Representative: being—
 (*a*) An Administrator.
 (*b*) An Executor.
3. A Constructive or Implied Trustee.

These meanings are not rendered inapplicable merely by reason of the trustee having a beneficial interest in the trust property. But the words do not include the duties incident to an estate conveyed by way of mortgage. In *re* Osborn's Mortgage Trusts (L. R., 12 Eq. 392) a mortgage of realty was made to two persons, one of whom afterwards went abroad. Upon a sale of the mortgaged property by the mortgagor so much of the purchase money as was payable to the mortgagees was invested in their joint names. The Court held it had no jurisdiction to make an order vesting in the purchaser the estate of the absent mortgagee. Lord Romilly said there were possibly two cases in which the Court might have authority under this Section (Section 10 of The Trustee Act, 1850, now replaced by Sections 26 and 32 of this Act) to appoint a person to convey the estate of a mortgagee who has been paid off. One is where the advance has been made out of trust funds, and a new trustee has been appointed in consequence of one of the former trustees being resident out of the jurisdiction. Another case is where two persons advance distinct sums out of their own moneys to make up one single sum: then if each were paid off and gave a receipt in full for all that was due to him, it might amount to a declaration that he was merely a trustee of the legal estate, and the Court might possibly make an order.

The case of *re* Walker's Mortgage Trusts (3 Ch. D. 208) was such a case as that contemplated in the first of the instances referred to by Lord Romilly in the above case. *Re* Underwood (3 K. & J. 745) is another case of a mortgage security being held by reason of its terms to create a trust. Locking *v.* Parker (8 Ch. 30) is the leading authority for the proposition that a mortgage even in the form of a trust for sale does not make the mortgagee a trustee in the ordinary sense for the mortgagor, though he may, after a sale, become trustee for him of the surplus proceeds of sale after paying off the incumbrances.

Trustees, whether express, constructive, or implied, and executors and administrators, when acting in the duties incident to the office of personal representatives of a deceased person, will accordingly have the powers and be entitled to the protection afforded by the Act. But the Court has no power to appoint persons to act as executors (*re* Moore, 21 Ch. D. 778, and *re* Willey, W. N. [1890] 1), though where the duties of executors as such are at an end, trustees may be appointed to carry on the trusts (Eaton *v.* Davies, W. N. [1894] 32).

"*Duties incident to the office of personal representative of a deceased person.*" —See note to Section 22, *supra*, p. 83, and note to Section 23, *supra*, p. 86.

What may be the exact meaning of "*a trustee whose trust arises by construction or implication of law*" is open to much judicial interpretation. Trusts are divided by Lewin ("Lewin on Trusts," 9th edition, p. viii.) as follows:—

1. Trusts by Act of a Party.
2. Trusts by Operation of Law.

As to 1.—Trusts by Act of a Party are subdivided into—

(i.) Express Trusts.
(ii.) Implied Trusts.

Express Trusts are further subdivided into—

(*a*) Executed Trusts.
(*b*) Executory Trusts.

Executory Trusts again are divided into—

(i.) Trusts in Marriage Articles.
(ii.) Trusts in Wills.

As to 2.—Trusts by Operation of Law are subdivided into—

(i.) Resulting Trusts.
(ii.) Constructive Trusts.

Resulting Trusts again are subdivided thus:—

(*a*) Legal Interest, but not the Equitable—
Disposed of—
(i.) By presumption of law.
(ii.) By force of words.

(*b*) Upon purchases in the names of third persons—
(i.) In the name of a stranger.
(ii.) In the name of a child.

The learned writer elsewhere defines an Implied Trust as "*one declared by a party not directly but only by implication*," while Trusts by Operation of Law "*are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity*"; and divides them into—(1) Resulting Trusts, as when an estate is devised to A. and his heirs upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; and (2) Constructive Trusts, which are trusts the Court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease. It seems clear, therefore, that if this division is adopted by the Courts, the Act will apply, amongst other cases, to the following constructive trusts: namely—Where a person holds property on a precatory trust; where a person agrees for valuable consideration to settle or sell a specific estate;

where property, whether real (Dyer *v.* Dyer, White & Tudor's L. C. 203) or personal (Elrand *v.* Dyer, 2 Ch. Ca. 36), has been conveyed to others than, or jointly with, the person who has paid the purchase-money. The actual operation of the Act in some of these cases will, however, be insignificant.

The following cases throw some light on the question :—

1. In *re* Angelo (5 De G. & Sm. 278) the vendor of shares in a joint stock bank has, *after* the contract, been held a trustee; and see also Gardner *v.* Cowles (3 Ch. D. 304), *re* Findlay (32 Ch. D. 221 and 641), *re* Bradshaw (2 De G. M. & G. 900), *re* Wood (3 De G. F. & J. 125), and *re* Davis's Trusts (L. R., 12 Eq. 214).

2. In cases relating to real estate it would appear that a vendor or his representative cannot be declared a trustee, unless the right to specific performance has been settled by a decree, for the reason that there might always be a question whether the contract could be enforced by a suit for specific performance, and it would be extremely inconvenient to declare the vendor to be a trustee upon a petition on which that point could not be decided. If the purchase-money is paid to the vendor in his lifetime, he then becomes a trustee of the legal estate (*re* Wilkinson, 12 W. R. 522; *re* Jones, W. N. [1888] 217; *re* Carpenter, Kay 418; *re* Colling, 32 Ch. D. 333; *re* Burt, 9 Hare 289 *re* Taylor, W. N. [1866] 5; *re* Faulder, W. N. [1866] 83; *re* Lowry's Will, L. R., 15 Eq. 78; Morgan *v.* Swansea Urban Sanitary Authority, 9 Ch. D. 582; *re* Badcock, 2 W. R. 386; Dewar *v.* Maitland, L. R., 2 Eq. 834; *re* Martin's Trusts, 34 Ch. D. 619; *re* Pagani [1892], 1 Ch. 236).

But Section 4 of The Conveyancing and Law of Property Act, 1881, render this of little importance, as by it the personal representative of a deceased vendor can complete if the contract was enforceable at the death of the vendor (Lysaght *v.* Edwards, 2 Ch. D. 506).

3. The owner of copyholds covenanting to surrender, and declaring that in the meantime he will stand seized upon trust for the covenantee, is a trustee within the Act (*re* Collingwood's Trusts, 6 W. R. 536; Steele *v.* Walter, 28 Beav. 466; *re* Bradley's Settled Estate, 54 L. T., N. S. 43; *re* Wise, 5 De G. & Sm. 415; and *re* Cuming, L. R., 5 Ch. 72).

4. An assignee in bankruptcy (*re* Joyce's Estate, L. R., 2 Eq. 576).

5. For the case of a mortgagee see *re* Crowe's Mortgage (L. R., 13 Eq. 26), and London and County Banking Co. *v.* Goddard (66 L. J., Ch. 261).

Repeal.

51. The Acts mentioned in the Schedule to this Act are hereby repealed, except as to Scotland, to the extent mentioned in the third column of that Schedule.

Section 51.—See Appendix I., showing the Enactments repealed and the corresponding Sections of The Trustee Act, 1893, and Appendix II., showing the Sections of The Trustee Act, 1893, and the Sections to which they correspond in the repealed Acts.

Section 38 of The Interpretation Act, 1889 (52 & 53 Vict. c. 63), is as follows:—"Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted" (see note to Section 46).

52. This Act does not extend to Scotland. Extent of Act.

Section 52.—The Act applies to Ireland, but in several particulars was imperfect in its application to that country, and had to be amended by The Trustee Act, 1893, Amendment Act, 1894 (see p. 167, *infra*).

53. This Act may be cited as The Trustee Act, 1893. Short title.

Section 53.—By The Interpretation Act, 1889, Section 35 (1), it is enacted: "In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more Statutes or Sessions than one in the same regnal year, by reference to the Statute or the Session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the Section or Sub-section of the Act in which the enactment is contained."

54. This Act shall come into operation on the *First day of January, One thousand eight hundred and ninety-four.* Commencement.

Section 54.—This Section must, of course, be read subject to the express declaration in certain of the Sections that the Act applies to deeds, transactions, &c., which have taken place before the passing of it.

The following is a list of the Sections which alter the date so fixed:—

By Section 4, Sections 1 to 3 inclusive, relating to investments, are to apply *as well to trusts created before as to trusts created after the passing of this Act.*

By Section 5 a trustee "*shall be deemed to have always had power to invest*" as therein mentioned.

The following Sub-sections also alter the date:—Section 8 (4), Section 9 (2), Section 10 (6), Section 11 (4), Section 12 (5), Section 13 (3), Section 14 (4), Section 17 (4), Section 18 (3), Section 19 (3), Section 20 (2), Section 21 (4), Section 22 (2), Section 45 (2), and Section 47 (3).

As a general rule an Act of Parliament comes into effect at the beginning of the day on which it received the Royal Assent, unless there are words (as in the Sections above mentioned of The Trustee Act, 1893) expressly postponing that commencement.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. III. c. 52 -	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101 -	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32 -	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96 -	An Act for better securing trust funds, and for the relief of trustees.	The whole Act.
11 & 12 Vict. c. 68 -	An Act for extending to Ireland an Act passed in the last Session of Parliament, entitled "An Act for better "securing trust funds, "and for the relief of "trustees."	The whole Act.
12 & 13 Vict. c. 74 -	An Act for the further relief of trustees.	The whole Act.
13 & 14 Vict. c. 60 -	The Trustee Act, 1850 -	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four, and fifty-five; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
15 & 16 Vict. c. 55 -	The Trustee Act, 1852 -	Sections one to five, eight, and nine; also the residue of the Act except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
17 & 18 Vict. c. 82 -	The Court of Chancery of Lancaster Act, 1854.	Section eleven.
18 & 19 Vict. c. 91 -	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the Court exercising jurisdiction in lunacy in Ireland.
20 & 21 Vict. c. 60 -	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.
22 & 23 Vict. c. 35 -	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty, and thirty-one.
23 & 24 Vict. c. 38 -	The Law of Property Amendment Act, 1860.	Section nine.
25 & 26 Vict. c. 108 -	An Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole Act.
26 & 27 Vict. c. 73 -	An Act to give further facilities to the holders of Indian stock.	Section four.
27 & 28 Vict. c. 114 -	The Improvement of Land Act, 1864.	Section sixty, so far as it relates to trustees; and Section sixty-one.
28 & 29 Vict. c. 78 -	The Mortgage Debenture Act, 1865.	Section forty.
31 & 32 Vict. c. 40 -	The Partition Act, 1868.	Section seven.
33 & 34 Vict. c. 71 -	The National Debt Act, 1870.	Section twenty-nine.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
34 & 35 Vict. c. 27 -	The Debenture Stock Act, 1871.	The whole Act.
37 & 38 Vict. c. 78 -	The Vendor and Purchaser Act, 1874.	Sections three and six.
38 & 39 Vict. c. 83 -	The Local Loans Act, 1875.	Sections twenty-one and twenty-seven.
40 & 41 Vict. c. 59 -	The Colonial Stock Act, 1877.	Section twelve.
43 & 44 Vict. c. 8 -	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.
44 & 45 Vict. c. 41 -	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.
45 & 46 Vict. c. 39 -	The Conveyancing Act, Act, 1882.	Section five.
46 & 47 Vict. c. 52 -	The Bankruptcy Act, 1883.	Section one hundred and forty-seven.
51 & 52 Vict. c. 59 -	The Trustee Act, 1888 -	The whole Act, except Sections one and eight.
52 & 53 Vict. c. 32 -	The Trust Investment Act, 1889.	The whole Act, except Sections one and seven.
52 & 53 Vict. c. 47 -	The Palatine Court of Durham Act, 1889.	Section eight.
53 & 54 Vict. c. 5 -	The Lunacy Act, 1890.	Section one hundred and forty.
53 & 54 Vict. c. 69 -	The Settled Land Act, 1890.	Section seventeen.
55 & 56 Vict. c. 13 -	The Conveyancing and Law of Property Act, 1892.	Section six.

THE TRUSTEE ACT, 1893, AMENDMENT ACT, 1894.

(57 & 58 VICT., CHAPTER 10.)

An Act to Amend The Trustee Act, 1893. [18th June, 1894.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Amendment of 56 & 57 Vict. c. 53, s. 30.

1. In Section 30 of The Trustee Act, 1893, the words "as heir, or under the Will of a deceased person for payment of whose debts the judgment was given or order made," shall be repealed.

Extension to Ireland of 56 & 57 Vict. c. 53, s. 41.

2. The powers conferred on the High Court in England by Section 41 of The Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions, except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Amendment of 56 & 57 Vict. c. 53, s. 44.

3. In Section 44 of The Trustee Act, 1893, after the word "trustee," in the first two places where it occurs, shall be inserted the words "or other person."

Liability of trustee in case of change of character of investment.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.

Short title.

5. This Act may be cited as The Trustee Act, 1893, Amendment Act, 1894.

Sections 1, 2, and 3 of this Act are referred to under the appropriate Sections of The Trustee Act, 1893.

Section 4.—*In re* Chapman, Cocks *v.* Chapman ([1896] 1 Ch. 323), decides that Section 4 of the above Act has no retrospective operation so as to exempt the trustees of a Will from liability for a breach of trust committed *before the passing* of the Act (the 18th of June, 1894) in *retaining* an investment of their testator not authorised by the Will or by the general law.

In that case testator directed the trust moneys under his Will to be invested upon "good real or Government security." His residuary estate consisted of mortgages on land. Owing to agricultural depression the trustees decided not to call in the mortgages, and the question raised was whether they were liable for any breach of trust by reason of their having continued to hold the outstanding mortgage securities as investments. The testator's death occurred in 1880. The question was raised by summons on the 7th of August, 1893, the Chief Clerk's certificate being made on the 3rd of July, 1895, after the passing of the above Act.

Kekewich, J., considered that the investments ought to have been called in by July, 1881, twelve months from the testator's death, and decided that, on the principle laid down by Lord Hatherley, in Pardo *v.* Bingham (L. R., 4 Ch. 735), "that except there be a clear indication either from the subject-matter or from the wording of a statute" a statute is not to be construed retrospectively, the Section was not retrospective, and that the trustees therefore could not be relieved under it from the breach of trust for which they were liable when it came into effect. In the judgment in this case it is pointed out that the Section differs materially in language from that of Sub-section 3 of Section 8 of the Act of 1888 and Sections 8 and 9 of the Act of 1893, as it uses the word "liable" instead of the word "chargeable."

Incidentally the case also decides that an originating summons may be an "action or proceeding against a trustee" within the meaning of Sub-section 1 (*a*) and (*b*) of Section 8 of The Trustee Act, 1888 (see note to Section 1 of The Trustee Act, 1893, *supra*, p. 30).

The case of *re* Roth, Goldberger *v.* Roth (W. N. [1896] 16, No. 15), is an authority that a power in a Will to postpone the conversion of securities directed to be sold does not authorise postponement for a definite time, and not to be vested in a majority of trustees.

In *re* Smith, Arnold *v.* Smith ([1896] 1 Ch. 171), it was held that a power to postpone the sale of all or any part of a residue devised and bequeathed on trust to sell, and particularly to sell his business of a pawnbroker with all convenient speed, does not give power to carry on the business for an indefinite time.

THE JUDICIAL TRUSTEES ACT, 1896.

(59 & 60 VICT., CHAPTER 35.)

An Act to provide for the Appointment of Judicial Trustees and otherwise to Amend the Law respecting the Administration of Trusts and the Liability of Trustees.

[14th August, 1896.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power of Court on application to appoint judicial trustee.

1. (1) Where application is made to the Court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the Court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

(2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the Court is not satisfied of the fitness of a person so nominated, an official of the Court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the Court as an officer thereof.

(4) The Court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof.

(5) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the Court may assign in each case, subject to any Rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special reasons otherwise order, cover all his work and personal outlay.

(6) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the Court by the prescribed persons, and, in any case where the Court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

Section 1.—This Section introduces into English law for the first time a judicial trustee for *private trust funds*. The appointment is to be made by "the Court." By Section 2 "the Court" having jurisdiction in such matters is to be the High Court, which, for the purposes of this Act, is the Chancery Division of the High Court, the Palatine Court, and any County Court to the Judge of which jurisdiction is assigned under Sub-section 1 (6) of Section 4 of the Act (see Rules 2, 30, and 31, Appendix IV., Part C., *infra*). The Rules prescribe the form of application (see Rule 2 *et seq.*, Appendix IV., Part C., *infra*):—

(*a*) If not made in a pending cause or matter, it is to be made by originating summons.

(*b*) If made in a pending cause or matter, it is to be made as part of the relief claimed, or by summons in the cause or matter.

An official of the Court cannot be appointed or act as judicial trustee for any persons in their capacity as members or debenture holders of or being in any other relation to any incorporated or unincorporated company or any club (see Rule 26, Appendix IV., Part C., *infra*).

Sub-section 1.—The applicant may be—

(1) The person (*a*) who has created the trust, or (*b*) intends so to create one.

(2) Any trustee of a trust already created.

(3) Any beneficiary under an existing trust.

The Act does not apply to any charity, whether subject to or exempted from The Charitable Trusts Acts, 1853 to 1894 (see Section 6, Sub-section 2). The jurisdiction is discretionary, not *ex debito justitiæ*.

Application may be made to have a judicial trustee appointed, either—

(i.) As sole trustee.

(ii.) Jointly with any other person (who presumably may be a continuing trustee).

(iii.) In place of existing trustees, or any of them.

But in this last-mentioned case "sufficient cause" must be shown. A "sufficient cause" will probably be held to be such a cause as is now necessary to enable the Court to remove a trustee of a trust.

Sub-section 2.—An executor or administrator is a trustee within the meaning of the Act; and the administration of the property of a deceased person is a trust. So, apparently, after an executor or administrator is constituted, it would be possible to have a "judicial trustee" appointed to administer the estate. The Rules (No. 25) provide that any person who is an executor or administrator may be appointed a judicial executor or administrator for the purpose of the collection and distribution of the estate of a deceased person in the same manner and subject to the same provisions as a person may be appointed a judicial trustee of a trust.

Sub-section 3.—"Any fit and proper person."—See as to the meaning of these words the notes to Sections 10 and 25 of The Trustee Act, 1893, and also Rule 5 of the Rules issued under this Act, Appendix IV., Part C.

The Court may appoint either the person nominated or an official of the Court. In either case the judicial trustee is subject to the control and supervision of the Court.

By the Rules issued under the Act it is provided that the Court shall not be precluded by any existing practice as to the appointment of trustees from appointing any person to be a judicial trustee by reason of that person being a beneficiary, or relation or husband or wife of a beneficiary, or a solicitor to the trust or to the trustee or any beneficiary, or a married woman, or standing in any special position with regard to the trust. A person may be appointed a judicial trustee of a trust even if he is already a trustee of the trust (see Rule 5, Appendix IV., Part C.).

Where an official of the Court is appointed judicial trustee, the official solicitor of the Court is to be so appointed, unless for special reasons the Court directs that some other official of the Court shall be so appointed (Rule 7).

Sub-section 4.—The Court, in addition to appointing a judicial trustee, may give any general or special directions in regard to the trust or the administration thereof. It can do this of its own mere motion, or on request by the applicant or any party to the application. This power would apparently enable the Court on appointing a judicial trustee to decide any question of administration which may have arisen in connection with the trust. It also enables the Court to lay down general or special instructions for administering the trust irrespective of whether any question of difficulty has arisen or not.

The Rules provide in a comprehensive way for the administration of a trust by a judicial trustee and for the account and audit of the funds. The

direction of the Court can be obtained at any time by a judicial trustee as to the way he is to act in the administration of the trust (see Rules 12 and 28).

Sub-section 5.—This is a comprehensive Sub-section permitting payment for his services being made to a judicial trustee. The amount of the remuneration is not to exceed "the prescribed limits." "Prescribed" by Section 5 means prescribed by the Rules under the Act. For the "limits" which have been so prescribed see Rules 17 to 19, Appendix IV., Part C.

The remuneration must include all work done and personal outlay. The principle of payment to a private trustee for his services was not unknown to the law as it stood previous to this Act. The creator of a trust could, if he thought fit, authorise the payment of remuneration; and the Court itself will under certain circumstances permit or even order it (see *in re* Freeman's Trusts, 37 Ch. D. 148, and Marshall *v.* Holloway, 2 Sw. 432, at p. 453).

Sub-section 6.—The audit here provided for would apply to trusts of which one only of the trustees is a judicial trustee, as well as to cases where there is more than one judicial trustee.

A report has also to be made by "the prescribed persons."

Ample control is retained over the judicial trustee, as the Court can, under this Section, direct an inquiry into the administration of the trust, or into any dealing or transaction of the judicial trustee.

Court to exercise jurisdiction.

2. The jurisdiction of the Court under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a Palatine Court, and (subject to the prescribed definition of the jurisdiction) by any County Court Judge to whom such jurisdiction may be assigned under this Act.

Section 2.—The Courts having jurisdiction under this Act are the High Court, the Palatine Courts of Lancaster and Durham, and any County Court to which jurisdiction is given by the Rules under the Act (see *infra*, Section 4, Sub-section 6; see also Rules 29, 30, and 31, Appendix IV., Part C.).

Jurisdiction of Court in cases of breach of trust.

3. (1) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.

(2) This Section shall come into operation at the passing of this Act.

Section 3.—This Section introduces a novel principle into the Law of Trusts. It is founded on the report of the Select Committee of the House of Commons which sat in 1895, and (*inter alia*) made the following remarks on the question of relief of trustees:—"In a recent decision in the House of Lords, Speight *v.* Gaunt, a step was taken in the direction of alleviating the position of a trustee, and the overwhelming weight of opinion among the witnesses who gave evidence before your Committee was in favour of a still further alleviation. Your Committee recommend that the Court be empowered to relieve any trustee from personal liability when satisfied that he has acted honestly and reasonably with the intention of carrying out the terms of the trust, and ought fairly to be excused for having acted without the direction of the Court."

Speight *v.* Gaunt (9 App. Cas. 1) simply decided that a trustee was justified in following the ordinary course of business when investing trust moneys, and that he consequently was not liable for a loss incurred by the dishonesty of an agent properly employed. The Section of this Act goes a step further, and permits the Court to wholly or partially relieve a trustee who has acted honestly and reasonably, even though not in accordance with ordinary business caution, or according to the usual routine.

Sub-section 1.—It will be seen that this Section has adopted the very words of the Committee's report, "honestly and reasonably." Two defences will therefore be open to a trustee charged with breach of trust (in addition of course to the defence that the act complained of is in fact not a breach of trust):—

(i.) That the liability is barred by the Statute of Limitations.

(ii.) That he has acted honestly and reasonably, and ought fairly to be excused for the breach.

It will be noticed that the defence is available by *any* trustee, *whether appointed under this Act or not*, and that the protection afforded applies whether the breach was committed before or after the passing of the Act (see as to mode of raising this defence *re* Stuart, Smith *v.* Stuart, W. N. [1897] 73, No. 9).

The onus will doubtless be on the trustee to substantiate the following allegations to shield him from liability:—

(i.) That he has acted honestly and reasonably.*

(ii.) That he ought fairly to be excused—

(*a*) For the breach of trust; and

(*b*) For omitting to obtain the directions of the Court in the matter in which he committed such breach.

The condition which seems to be implied in the words "for omitting to obtain the directions of the Court" is somewhat ambiguous. The transaction which, in any case of a trustee's liability, is alleged as the breach cannot be any more

* The onus of proving this clearly lies with the trustee, and the requirements of Section 8 of The Trustee Act, 1893, constitute, where the breach consists in investing on insufficient securities, a standard by which reasonable conduct is to be judged, although non-compliance with these requirements is not necessarily a fatal obstacle to an application for relief (*re* Stuart, Smith *v.* Stuart, W. N. [1897] 84, No. 4).

or even less a breach whether the Court be applied to or not. If it were a breach he ought not to have committed it. The words would seem to suggest that where a trustee is contemplating, either *ex mero motu* or on the request or at the instigation of a beneficiary, a breach of trust, he may hold the matter in suspense, and say "we will get the opinion of the Court." If this be so the resort to the Court will be more frequent than hitherto. Probably this is the meaning, for earlier in the Section occur the words "is or may be personally liable," suggesting that a trustee may get plenary or partial absolution in anticipation as it were. Judicial comment will, however, be freely made on this Section, so that its meaning will become tolerably clear.

The power of relief given to the Court is wholly discretionary: "the Court *may relieve* the trustee either *wholly or partly*."

Sub-section 2.—This Section came into operation on the 14th of August, 1896. In *re* Turner, Barker *v.* Ivimey ([1897] 1 Ch. 536), Byrne, J., held that the power to relieve a trustee from personal liability for a breach of trust, where he has acted honestly and reasonably, given by the above Section is meant to be acted on freely and fairly in the exercise of judicial discretion; but the Court must, before exercising the power, be satisfied by sufficient evidence that the trustee acted *reasonably as well as honestly.* No general rules or principles can be laid down as those to be acted upon in carrying out the Section; each case depends on its own circumstances (*re* Stuart, Smith *v.* Stuart, W. N. [1897] 84, No. 4).

The action was brought by the tenant for life and remainderman of a trust fund against the surviving trustee and the personal representatives of a deceased trustee to replace a trust fund which had been lost. The two trustees appointed by the testatrix were a solicitor and a linendraper. They invested the trust money on a mortgage, which was an improper investment, both as to its nature and as to its value, and the Court refused to excuse the linendraper as it was not satisfied that he had acted with the care which he would probably have taken if the money had been his own, but found he had relied on the solicitor. The Court, following Lockhart *v.* Reilly ([1856] 25 L. J., Ch. 697), ordered the solicitor to indemnify his co-trustee from the loss resulting from his negligence.

Where one of two trustees allowed his co-trustee, a solicitor, to pay part of the trust funds into his partnership account at a bank, who established a claim on the fund for moneys overdrawn by the firm, this conduct was held not "reasonable" within the meaning of the Act (Wynne *v.* Tempest, W. N. [1897] 43, No. 14; see also S. C. [1897] 1 Ch. 110, and *re* Stuart, Smith *v.* Stuart, W. N. [1897] 73, No. 9, for mode of raising defence).

Rules.

4. (1) Rules may be made for carrying into effect this Act, and especially—

(1) For requiring judicial trustees, who are not officials of the Court, to give security for the due application of any trust property under their control:

(2) Respecting the safety of the trust property, and the custody thereof:

(3) Respecting the remuneration of judicial trustees and for fixing and regulating the fees to be taken under this Act so as to cover the expenses of the administration of this Act, and respecting the payment of such remuneration and fees out of the trust property, and, where the judicial trustee is an official of the Court, respecting the application of the remuneration and fees payable to him:

(4) For dispensing with formal proof of facts in proper cases:

(5) For facilitating the discharge by the Court of administrative duties under this Act without judicial proceedings, and otherwise regulating procedure under this Act and making it simple and inexpensive:

(6) For assigning jurisdiction under this Act to County Court judges and defining such jurisdiction:

(7) Respecting the suspension or removal of any judicial trustee, and the succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in such person of any trust property:

(8) Respecting the classes of trusts in which officials of the Court are not to be judicial trustees, or are to be so temporarily or conditionally:

(9) Respecting the procedure to be followed where the judicial trustee is executor or administrator:

(10) For preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity:

(11) For the filing and auditing of the accounts of any trust of which a judicial trustee has been appointed.

(2) The Rules under this Act may be made by the Lord Chancellor, subject to the consent of the Treasury in matters relating to fees and to salaries and numbers of officers, and to the consent of the authority for making orders under The Solicitors Remuneration Act, 1881, in matters relating to the remuneration of solicitors. The Rules shall be laid before Parliament and have the same force as if enacted in this Act, provided that if, within thirty days after such Rules have been laid before either House of Parliament during which that House has sat, the House presents to Her Majesty an address against such Rules or any of them, such Rules or the Rule specified in the address shall thenceforward be of no effect.

44 & 45 Vict. c. 44.

Section 4.—For the Rules issued hereunder see *infra*, Appendix IV., Part C.

Definitions.

5. In this Act—

The expression "official of the Court" means the holder of such paid office in or connected with the Court as may be prescribed.

The expression "prescribed" means prescribed by Rules under this Act.

Section 5.—The expression "*official of the Court*" occurs in Sub-sections 3 and 5 of Section 1, and also in Sub-section 1 (1), (3), and (8) of Section 4.

Short title, extent, and commencement of Act.

6. (1) This Act may be cited as The Judicial Trustees Act, 1896.

(2) This Act shall not extend to any charity, whether subject to or exempted from The Charitable Trusts Acts, 1853 to 1894.

(3) This Act shall not extend to Scotland or Ireland.

(4) This Act, except as by this Act otherwise provided, shall come into operation on the *First day of May, One thousand eight hundred and ninety-seven.*

Section 6, *Sub-section* 3.—Why Irish trustees should be exempted from this Act is not clear.

Sub-section 4.—Section 3 (as to a trustee being excused if he has acted honestly and reasonably) came into operation on the 14th of August, 1896.

APPENDIX I.

TABLE SHOWING THE ENACTMENTS REPEALED BY AND THE CORRESPONDING SECTIONS OF THE TRUSTEE ACT, 1893.

NOTE.—Where a whole Act is, or all the Sections of an Act remaining unrepealed are, repealed, the words "the whole Act" are inserted in the first column of this Table. For the titles of these Acts see the Schedule to The Trustee Act, 1893, pp. 164 to 166, *supra*.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
36 Geo. III., c. 52, s. 32 (E.)	Payment into court.	Section 42.
9 & 10 Vict. c. 101, s. 37 (E.*) - - -	Power to invest subject to drainage, rent-charge.	Section 6.
10 & 11 Vict. c. 32, s. 53 (I.) - -	Ditto.	Section 6.
10 & 11 Vict. c. 96, ss. 1, 2 (E.) - - [The whole Act]	Payment into court.	Section 42.
s. 3 s. 4 s. 5 s. 6	———	Already repealed. See Revised Statutes.
11 & 12 Vict. c. 68 (I.) [The whole Act.]	Extending Trustee Relief Act to Ireland.	Sections 42 and 49.
12 & 13 Vict. c. 74, s. 1 (E.)	Payment into court.	Sections 42 and 49.
[The whole Act] s. 2	Act may be amended &c.	Spent and repealed. Stat. Law Rev. 1875.

* Repealed as to Ireland by 10 & 11 Vict. c. 32, s. 1.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
13 & 14 Vict. c. 60, s. 1	Repealing clause.	Spent and repealed. Stat. Law Rev. 1875.
s. 2	Definitions.	Section 50.
s. 3 s. 4 s. 5 s. 6	Vesting orders in lunacy.	These Sections relate wholly to lunacy, and, being repealed, except as to Ireland, by The Lunacy Act, 1890, are not affected by the repealing clause of the present Act.
s. 7 s. 8	Vesting orders in case of infant trustee or mortgagee of land or contingent right in land.	Sections 26, 28, 32.
s. 9 s. 10 s. 11 s. 12 s. 13 s. 14 s. 15	Orders as to estate or contingent right of trustee or heir of trustee.	Sections 26 and 32.
s. 16	Order as to contingent rights of unborn persons.	Section 27.
s. 17 s. 18	———	Repealed by 15 & 16 Vict. c. 55, s. 2.
s. 19	Vesting order in place of conveyance by heir or devisee of mortgagee.	Sections 29 and 32.
s. 20	Power to appoint a person to convey or transfer.	Sections 33 and 35 (2).
s. 21	Jurisdiction in case of lands in Lancaster or Durham.	Extended by 17 & 18 Vict. c. 82, s. 11, and 52 & 53 Vict. c. 47, s. 8. Included in Section 46.
s. 22 s. 23 s. 24 s. 25	Vesting orders as to stock &c.	Section 35 (1).
s. 26	Effect of order to transfer stock.	This, as modified by 15 & 16 Vict. c. 55, s. 6, is dealt with by Section 35 (3) and (4).
s. 27	Effect of order vesting legal right to sue for a chose in action.	Omitted as unnecessary.
s. 28	Effect of an order vesting copyhold lands.	Section 34.
s. 29	Order where decree is made for sale of real estate for payment of debts.	Section 30.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
13 & 14 Vict. c. 60, s. 30	Power of court to declare parties to suit to be trustees.	Section 31.
s. 31	Power to give directions as to exercise of right to stock &c.	Section 35 (5).
s. 32	Power of court to appoint new trustees.	Section 25 (1).
s. 33	New trustees to have same powers as if appointed by decree in a suit.	
s. 34	Power to court to vest lands in new trustee.	Sections 26 and 32.
s. 35	Power to court to vest right to call for transfer &c. in trustee.	Section 35 (1).
s. 36	Old trustees not to be discharged from liability.	Section 25 (2).
s. 37	Persons entitled to apply for vesting orders.	Section 36.
s. 38	———	Repealed. Stat. Law. Rev. 1875.
s. 39	———	
s. 40	Powers to present petition, and as to evidence.	This is procedure, and as to evidence by affidavit is provided for by Order XXXVIII., Rule 1 *et seq.*
s. 41	What may be done upon petition.	This is likewise procedure, and is already provided for by Rules of Court, Order XXXIII., Rule 2, and Order LII., Rule 7.
s. 42	Courts may dismiss petition with or without costs.	Likewise procedure.
s. 43	Court may make an order in a cause.	Likewise procedure.
s. 44	Order to be conclusive evidence of facts on which they are founded.	Section 40.
s. 45	Vesting orders as to charitable trusts.	Section 39.
s. 46	No escheat of trust estate, but only of beneficial interest.	Section 48.
s. 47		
s. 48	Money of infants and persons of unsound mind charged upon property may be paid into court by person by whom money is payable.	Dealt with in general terms by Section 42.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
13 & 14 Vict. c. 60, s. 49	Court may make decree in absence of a trustee.	Section 43.
s. 50	———	Repealed. Stat. Law Rev. 1875.
s. 51	Power to charge costs of order on trust estate.	Section 38.
s. 52	Commission concerning lunatic.	Refers to lunacy only, and is subject to the same remarks as Sections 3 to 6, *supra*, p. 178.
s. 53	Court may postpone order until right established in a suit.	Procedure.
s. 54	Application of vesting orders to land out of England.	Sections 41 and 52.
s. 55	Powers of Court of Chancery in Ireland.	Omitted as unnecessary, having regard to s. 13 of The Interpretation Act, 1889, which declares that the expression "High Court," when used with reference to Ireland, shall mean the High Court in Ireland (see also s. 2 of The Trustee Act, 1893, Amendment Act, 1894).
s. 56	Extent of powers of Lord Chancellor in lunacy.	Refers to lunacy only, and is subject to the same remarks as Sections 3 to 6, *supra*, p. 178.
s. 57	Lunacy jurisdiction in Ireland.	Refers to the exercise of lunacy jurisdiction in Ireland, and is therefore saved by the exception to the repealing Section contained in this Act.
s. 58	Short title.	———
s. 59 s. 60	———	Repealed. Stat. Law Rev. 1875.
15 & 16 Vict. c. 55, s. 1	Vesting order consequential on decree in suit	Sections 30 and 32.
s. 2	Vesting order in case of refusal by trustee to convey.	Included in Sections 26 and 32.
s. 3 s. 4 s. 5	Vesting orders as to stock &c.	Section 35 (1).

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
15 & 16 Vict. c. 55, s. 6	Effect of vesting order.	Section 35 (3) and (4) and Section 50, "Transfer."
s. 7	Indemnity.	Section 49.
s. 8	Power to court to appoint new trustee in place of a convict.	Included in Sections 25 (1) and 32.
s. 9	Power to court to appoint new trustee where there is no existing trustee.	
s. 10	Orders and jurisdiction in lunacy.	Refer to lunacy only (see remarks on Sections 3 to 6 of 13 & 14 Vict. c. 60, p. 178).
s. 11		
s. 12	Act to be construed as part of Trustee Act, 1850.	———
s. 13	Stamp duty.	Superseded by 54 & 55 Vict. c. 39, s. 62.
17 & 18 Vict. c. 82, s. 11	Extension of powers to County Palatine of Lancaster.	Included in Section 46.
18 & 19 Vict. c. 91, s. 10	Shares in ships to be treated as if they were stock for the purpose of a vesting order.	Section 35 (6). The Lunacy Act, 1890, s. 341, definition of "Stock," preserves the effect of the Section as to vesting orders in lunacy made by the Court in England.
20 & 21 Vict. c. 60, s. 322 (I.)	Ireland. Power of court to appoint new trustee in place of bankrupt or insolvent.	Section 25 (1).
22 & 23 Vict. c. 35, s. 26	Trustees exonerated in respect of certain acts and payments.	Section 23.
s. 30	Trustees may apply to court for advice.	Unnecessary. Superseded by the recent practice as to originating summons (Order LV., Rule 3 *et seq.* and also Rules Supreme Court, Trustee Act, 1893).
s. 31	Implied indemnity of trustees.	Section 24.
23 & 24 Vict. c. 38, s. 9	Form of applying for advice of judge.	Unnecessary.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
25 & 26 Vict. c. 108, s. 1 (E.) [The whole Act.]	Confirming certain sales.	Merely confirms past transactions. Operation saved by Interpretation Act, 1889.
s. 2	Trustees with sanction of the court may dispose of land and minerals separately.	Section 44.
26 & 27 Vict. c. 73, s. 4	Trustees, unless authorised, not to apply for India stock certificate to bearer.	Section 7.
27 & 28 Vict. c. 114, s. 60	Power to invest in land improvement charges.	Section 5 (1) (*b*). The Section applies not only to trustees, but to directors and other persons. It is therefore repealed only as to trustees.
s. 61	Power to invest subject to land improvement charges.	Section 6.
28 & 29 Vict. c. 78, s. 40	Power to invest on mortgages under Mortgage Debenture Act.	Section 5 (5).
31 & 32 Vict. c. 40, s. 7	Extending power of Section 30 of Trustee Act to partition suits.	Section 31.
33 & 34 Vict. c. 71, s. 29	Trustees, unless authorised, not to apply for stock certificate to bearer.	Section 7.
34 & 35 Vict. c. 27, s. 1 [The whole Act.] s. 2	Power to invest in debenture stock.	Section 5 (2).
s. 3	Short title.	———
37 & 38 Vict. c. 78, s. 3	Trustees, vendors, or purchasers may sell under conditions of Vendor and Purchaser Act, 1874.	Section 15.
s. 6	Married woman as bare trustee may convey.	Section 16.
38 & 39 Vict. c. 83, s. 21	Trustees, unless authorised, not to apply for certificates to bearer under Local Loans Act.	Section 7.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
38 & 39 Vict. c. 83, s. 27	Power to invest in debentures under Local Loans Act.	Section 5 (3).
40 & 41 Vict. c. 59, s. 12	Trustees, unless authorised, not to apply for colonial stock certificates to bearer.	Section 7.
43 & 44 Vict. c. 8, s. 7	Power to invest in Isle of Man Government securities.	Section 5 (4). The Section applies to "trustees or other persons in the Isle of Man." It is therefore repealed only as to trustees.
44 & 45 Vict. c. 41, s. 31	Power of appointing new trustees.	Section 10.
s. 32	Retirement of trustee.	Section 11.
s. 33	Powers of trustee appointed by court.	Section 37.
s. 34	Vesting of trust property.	Section 12.
s. 35	How power of sale may be exercised.	Section 13.
s. 36	Trustees' receipts.	Section 20.
s. 37	Power of executors and trustees to compound &c.	Section 21.
s. 38	Power exerciseable by survivors of executors or trustees.	Section 22.
45 & 46 Vict. c. 39, s. 5	Appointment of separate sets of trustees.	Section 10.
46 & 47 Vict. c. 52, s. 147 (E.)	Court may appoint new trustee in place of trustee who is bankrupt.	Section 25 (1).
51 & 52 Vict. c. 59, s. 1	Short title, extent, and definition.	———
s. 2	Receipt by banker or solicitor as agent.	Section 17 (1) to (4).
s. 3	Depreciatory conditions of sale.	Section 14.
s. 4	Trustees acting reasonably excused for making certain investments.	Section 8.
s. 5	Liability confined to balance over what would have been a proper investment.	Section 9.

Enactments Repealed.	Subject Matter.	Corresponding Sections of The Trustee Act, 1893, and Remarks.
51 & 52 Vict. c. 59, s. 6	Indemnity against beneficiary.	Section 45.
s. 7	Trustees may insure buildings.	Section 18 (1) and (2).
s. 8	Limitations as to trust property.	Not repealed.
s. 9	Investment on mortgage of long terms.	Section 5 (1) (*a*).
s. 10	Trustees of renewable leaseholds may renew and raise money for the purpose.	Section 19 (1) and (2).
s. 11		
s. 12	To what trusts Act is applicable.	Sections 4, 17 (5), 18 (3), and 19 (3)
52 & 53 Vict. c. 32, s. 1	Short title.	———
s. 2	Extent of Act.	Section 52.
s. 3	Authorised investments.	Section 1.
s. 4	Purchase at a premium if redeemable by court.	Section 2.
s. 5	Discretion of trustee.	Section 3.
s. 6	To what trusts preceding Sections are applicable.	Section 4.
s. 7	Investment of sinking fund by local authorities.	Not repealed.
s. 8	———	Spent.
s. 9	Interpretation.	Section 50.
52 & 53 Vict. c. 47, s. 8	Application of Trustee Acts to Palatine County of Durham.	Section 46.
53 & 54 Vict. c. 5, s. 140	Order founded on allegation of personal incapacity to be conclusive evidence of fact alleged.	Section 40.
53 & 54 Vict. c. 69, s. 17	Application of Trustee Acts to trustees for the purposes of The Settled Land Acts, 1882 to 1890.	Section 47.
55 & 56 Vict. c. 13, s. 6	Appointment of new trustees.	Section 10.

APPENDIX II.

TABLE SHOWING THE SECTIONS OF THE TRUSTEE ACT, 1893, AND THE CORRESPONDING SECTIONS IN THE REPEALED ACTS.

NOTE.—The Sections of The Trustee Act, 1850 (13 & 14 Vict. c. 60), and of The Trustee Act, 1852 (15 & 16 Vict. c. 55), marked thus (*) are still unrepealed so far as they relate to the Court exercising jurisdiction in Lunacy in Ireland.

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 1 - -	Authorised investments.	Section 3 -	The Trust Investment Act, 1889 (52 & 53 Vict. c. 32).
Section 2 - -	Purchase at a premium of redeemable stock.	Section 4 -	,, ,,
Section 3 - -	Discretion of trustees	Section 5 -	,, ,,
Section 4 - -	Application of preceding Sections.	Section 6 -	,, ,,
Section 5 - -	Enlargement of express powers of investment:—	———	———
Section 5 (1) (*a*)	Investment on mortgage of long terms.	Sections 9 and 12.	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 5 (1) (*b*)	Power to invest in land improvement charges.	Section 60, so far as it relates to trustees.	The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).
Section 5 (2) -	Power to invest in debenture stock.	Sections 1 and 2.	The Debenture Stock Act, 1871 (34 & 35 Vict. c. 27).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 5 (3) -	Power to invest in debentures under Local Loans Act.	Section 27 -	The Local Loans Act, 1875 (38 & 39 Vict. c. 83).
Section 5 (4) -	Power to invest in securities of the Government of the Isle of Man	Section 7, so far as it relates to trustees.	Isle of Man Loans Act, 1880 (43 & 44 Vict. c. 8).
Section 5 (5) -	Power to invest on mortgages under Mortgage Debenture Act.	Section 40 -	The Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78).
Section 6 - -	Power to invest notwithstanding drainage charges.	Section 37 -	The Public Money Drainage Act, 1846 (9 & 10 Vict. c. 101).
,,	,, ,,	Section 53 -	Landed Property Improvement (Ireland) Act, 1847 (10 & 11 Vict. c. 32).
,,	,, ,,	Section 61 -	The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114).
Section 7 - -	Trustees, unless authorised, not to apply for or hold stock certificate to bearer.	Section 4 -	The India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73).
,,	,, ,,	Section 29 -	The National Debt Act, 1870 (33 & 34 Vict. c. 71).
,,	,, ,,	Section 21 -	The Local Loans Act, 1875 (38 & 39 Vict. c. 83).
,,	,, ,,	Section 12 -	The Colonial Stock Act, 1877 (40 & 41 Vict. c. 59).
Section 8 - -	Loans and investments by trustees not chargeable as breaches of trust.	Section 4 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 9 - -	Liability for loss by reason of improper investments.	Section 5 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 10 -	Power of appointing new trustees.	Section 31 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
,,	Appointment of separate sets of trustees.	Section 5 -	The Conveyancing Act, 1882 (45 & 46 Vict. c. 39).
,,	,, ,,	Section 6 -	The Conveyancing Act, 1892 (55 & 56 Vict. c. 13).
Section 11 -	Retirement of trustees.	Section 32 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 12 -	Vesting of trust property in new or continuing trustees.	Section 34 -	,, ,,
Section 13 -	How power of sale may be exercised.	Section 35 -	,, ,,
Section 14 -	Depreciatory conditions of sale.	Section 3 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 15 -	Trustees, vendors, or purchasers may sell under conditions of Vendor and Purchaser Act, 1874.	Section 3 -	The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).
Section 16 -	Married woman as bare trustee may convey.	Section 6 -	,, ,,
Section 17 (1) to (4).	Power to authorise receipt of money by banker or solicitor as agent.	Section 2 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 17 (5) -	To what trusts Act is applicable.	Section 12 -	,, ,,
Section 18 (1) and (2)	Trustees may insure buildings.	Section 7 -	,, ,,

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 18 (3) -	To what trusts Act is applicable.	Section 12 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 19 (1) and (2).	Trustees of renewable leaseholds may renew and raise money for the purpose.	Sections 10 and 11.	,, ,,
Section 19 (3) -	To what trusts Act is applicable.	Section 12 -	,, ,,
Section 20 -	Trustees' receipts -	Section 36 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 21 -	Power of executors and trustees to compound &c.	Section 37 -	,, ,,
Section 22 -	Powers exerciseable by survivors of executors or trustees.	Section 38 -	,, ,,
Section 23 -	Trustees exonerated in respect of certain acts and payments under powers of attorney.	Section 26 -	The Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35).
Section 24 -	Implied indemnity of trustees.	Section 31 -	,, ,,
Section 25 (1) -	Power of Court to appoint new trustees	Section 32 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	New trustees to have the same powers as if appointed by decree in a suit.	Section 33 -	,, ,,
,,	Power to Court to appoint a new trustee in the place of a convict.	Section 8 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
,,	Power to Court to appoint new trustee where there is no existing trustee.	Section 9 -	——

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 25 (1) -	Ireland: Power of Court to appoint new trustee in place of bankrupt or insolvent.	Section 322 -	The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).
,,	Court may appoint new trustee in the place of a trustee who is bankrupt.	Section 147 -	The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).
Section 25 (2) -	Old trustees not to be discharged from liability.	Section 36 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 26 -	Vesting orders as to land:—	———	———
,	Vesting orders in case of infant trustee or mortgagee of land, or contingent right in land.	Sections 7 and 8.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	Orders as to estate, or contingent right of trustee or heir of trustee.	Sections 9, 10, 11, 12, 13, 14, and 15.	,, ,,
,,	Power to Court to vest lands in new trustee.	Section 34 -	,, ,,
,,	Vesting order in case of refusal by trustee to convey.	Section 2 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 27 -	Order as to contingent rights of unborn person.	Section 16 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 28 -	Vesting order in place of conveyance by infant mortgagee.	Sections 7 and 8.	,, ,,
Section 29 -	Vesting order in place of conveyance by heir or devisee of mortgagee.	Section 19 -	,, ,,

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 30 -	Vesting order where a decree is made for sale or mortgage of real estate for payment of debts.	Section 29 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, ,,	Section 1 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 31 -	Power of Court to declare parties to suit to be trustees.	*Section 30 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, ,,	Section 7 -	The Partition Act, 1868 (31 & 32 Vict. c. 40).
Section 32 -	Effect of vesting order.	Sections 7 to 15, 19, and 34.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, ,,	Sections 1, 2, and 3.	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 33 -	Power of Court to appoint a person to convey or transfer.	*Section 20 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 34 -	Effect of an order vesting copyhold lands.	*Section 28 -	,, ,,
Section 35 (1) -	Vesting orders as to stock &c.	Sections 22, 23, 24, 25, and 35.	,, ,,
,,	,, ,,	Sections 3, 4, and 5.	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 35 (2) -	Power to appoint a person to transfer.	*Section 20 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 35 (3) -	Effect of order to transfer stock.	*Section 26 -	,, ,,
,,	,, ,,	*Section 6 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 35 (5) -	Power to give directions as to exercise of right to stock &c.	*Section 31 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 35 (6) -	Shares in ships to be treated as if they were stock for the purposes of a vesting order.	Section 10 -	Act to Amend The Merchant Shipping Act, 1854 (18 & 19 Vict. c. 91).†
Section 36 -	Persons entitled to apply for vesting orders.	*Section 37 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 37 -	Powers of trustees appointed by the Court.	Section 33 -	The Conveyancing Act, 1881 (44 & 45 Vict. c. 41).
Section 38 -	Power to charge costs of order on trust estate.	*Section 51 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 39 -	Vesting orders as to charitable trusts.	*Section 45 -	,, ,,
Section 40 -	Order made upon certain allegations to be conclusive evidence of the matters alleged upon any question as to the validity of the order.	Section 140 -	The Lunacy Act, 1890 (53 & 54 Vict. c. 5).
,,	,, ,,	*Section 44 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 41 -	Application of vesting orders to land out of England.	Section 54 -	,, ,,
Section 42 -	Payment into Court	Section 32 -	Legacy Duty Act, 1796 (36 Geo. III. c. 52).
,,	,, ,,	Sections 1 and 2	Trustee Relief Act, 1847 (10 & 11 Vict. c. 96).
,,	,, ,,	The whole Act	Trustee Relief (Ireland) Act, 1848 (11 & 12 Vict. c. 68).

† The definition of "Stock" in Section 341 of The Lunacy Act, 1890, preserves the effect of the Section as to Vesting Orders in Lunacy made in England.

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 42 -	Payment into Court -	Section 1 -	Act for the Further Relief of Trustees (12 & 13 Vict. c. 74).
,,	,, ,,	Section 48 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 43 -	Court may make order in the absence of a trustee.	Section 49 -	,, ,,
Section 44 -	Trustees with sanction of the Court may dispose of land and minerals separately.	Section 2 -	Act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others (25 & 26 Vict. c. 108).
Section 45 -	Making beneficiary indemnify for breach of trust.	Section 6 -	The Trustee Act, 1888 (51 & 52 Vict. c. 59).
Section 46 -	Jurisdiction in case of lands in Lancaster or Durham.	*Section 21 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, ,,	Section 11 -	Court of Chancery, Lancaster, Act, 1854 (17 & 18 Vict. c. 82).
,,	,, ,,	Section 8 -	Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47).
Section 47 -	Application to trustees under the Settled Land Acts of provisions for the appointment of new trustees.	Section 17 -	Settled Land Act, 1890 (53 & 54 Vict. c. 69).
Section 48 -	Trust estates not affected by trustee becoming a convict.	Sections 46 and 47.	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 49 -	Indemnity - -	Section 3 -	Trustee Relief (Ireland) Act (11 & 12 Vict. c. 68).
,,	,, -	Section 1 -	Act for the Further Relief of Trustees (12 & 13 Vict. c. 74).

Sections of Trustee Act, 1893.	Subject Matter.	Corresponding Sections of Repealed Acts.	Titles or Short Titles of Repealed Acts.
Section 49 -	Indemnity - -	Section 7 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
Section 50 -	*Definitions :—*		
,,	"Bankrupt" - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	"Convey" and "Conveyance."	,,	,, ,,
,,	"Devisee" - -	,,	,, ,,
,,	"Instrument" -	Section 9 -	The Trust Investment Act, 1889 (52 & 53 Vict. c. 32).
,,	"Land" - - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	"Mortgage" and "Mortgagee."	,,	,, ,,
,,	"Possessed" - -	,,	,, ,,
,,	"Stock" - - -	Section 9 -	The Trust Investment Act, 1889 (52 & 53 Vict. c. 32).
,,	"Transfer" - -	*Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
,,	,, - -	*Section 6 -	The Trustee Act, 1852 (15 & 16 Vict. c. 55).
,,	"Trust" - - -	Section 2 -	The Trustee Act, 1850 (13 & 14 Vict. c. 60).
Section 52 -	Extent of Act - -	Section 54 -	,, ,,
,,	,, ,, - -	Section 2 -	The Trust Investment Act, 1889 (52 & 53 Vict. c. 32).

APPENDIX III.

LIST OF TRUSTEE INVESTMENTS AUTHORISED BY THE TRUSTEE ACT, 1893.

NOTE.—The italic letters in parentheses refer to the Sub-sections of Section 1 of The Trustee Act, 1893, with corresponding letters.

PART I. (*a*).

New Two-and-three-quarters per Cent. until 1903, then Two-and-a-half per Cent., redeemable 1923 (*Göschens*).
Two-and-three-quarters per Cent., redeemable 1905 (*Childers*).
Two-and-a-half per Cent., redeemable 1905.
Local Loans Stock, 1912.

[For (*b*) see the Act, Section 1, Sub-section (*b*), p. 29, *ante*, which comprises Real or Heritable Securities in Great Britain or Ireland.]

PART II. (*c*).

Bank of England Stock.
Bank of Ireland Stock.

PART III. (*d*).

India Three-and-a-half per Cent. Stock, redeemable 1931.
India Three per Cent. Stock, redeemable 1948.
India Two-and-a-half per Cent. Stock.

PART IV. (*e*).

Canada Government Inter-Colonial Railway, redeemable 1903.
Canada Government Bonds, redeemable 1910–13.
Egyptian Government Guaranteed Loan.
Mauritius Inscribed Three per Cent. Stock, redeemable 1940.
Turkish Guaranteed Loan, 1855.

PART V. (*f*).

Metropolitan Perpetual Consolidated Three-and-a-half per Cent. Stock, redeemable 1929.
Metropolitan Consolidated Three-and-a-half per Cent. Stock, redeemable 1941.
Metropolitan Consolidated Two-and-a-half per Cent. Stock, redeemable 1920–49.
Metropolitan Police Debenture Three per Cent. Stock, redeemable 1920.

PART VI. (*g*).

Belfast and County Down Railway.
Caledonian Railway.
Dublin and Kingstown Railway.
Glasgow and South Western Railway.
Great Northern Railway.
Great Northern (Ireland) Railway.
Great North of Scotland Railway.
Great Southern and Western (Ireland) Railway.
Great Western Railway.
Highland Railway.
Isle of Wight Railway.
Lancashire and Yorkshire Railway.
London and Blackwall Railway.
London, Brighton and South Coast Railway.
London and North Western Railway.
London and South Western Railway.
London, Tilbury and Southend Railway.
Maryport and Carlisle Railway.
Midland Railway.
Midland Great Western of Ireland Railway.
North Eastern Railway.
North London Railway.
North Staffordshire Railway.
Rhymney Railway.
South Eastern Railway.

PART VII. (*h*).

Arbroath and Forfar Railway.
Ayr and Maybole Junction Railway.
Birkenhead Railway.
Birmingham Canal.
East Lincolnshire Railway.
Hammersmith and City Railway.
London and Greenwich Railway.
Nottingham and Grantham Railway.
North and South Western Junction Railway.
Royston and Hitchin Railway.
Shrewsbury and Hereford Railway.
West London Railway.
Weymouth and Portland Railway.
Victoria Station and Pimlico Railway.

PART VIII. (*i*).

Eastern Bengal Railway Four per Cent. Debenture Stock.
East India Railway Four-and-a-half per Cent. Debenture Stock.
Great Indian Peninsular Railway Four per Cent. Debenture Stock.
South Indian Railway Four-and-a-half per Cent. Debenture Stock.

PART IX. (*j*).

Eastern Bengal B Annuities.
East India B Annuities.
East India C Annuities.
East India D Annuities.
Scinde, Punjaub and Delhi Railway B Annuities.

PART X. (*k*).

*Bombay, Baroda and Central India Guaranteed Five per Cent.
†Bengal-Nagpur Railway Four per Cent. Guaranteed, redeemable 1913.
*Great Indian Peninsula Railway Five per Cent. Guaranteed.
†Indian Midland Railway Four per Cent. Guaranteed, redeemable 1910.

* These companies pay more than the guaranteed dividend. It is a question whether a trustee is warranted in giving the extra price for the surplus dividend.

† These Stocks can only be bought when the price is at or below 115.

PART XI. (*l*).

Airdrie and Coatbridge Waterworks.
Bristol Waterworks.
Chelsea Waterworks.
East London Waterworks.
Fylde Waterworks.
Grand Junction Waterworks.
Lambeth Waterworks.
Newcastle and Gateshead Waterworks.
New River Waterworks.
Southwark and Vauxhall Waterworks.
West Middlesex.

PART XII. (*m*).

*Barnsley Three per Cent., redeemable after 1916.
*Bath Three per Cent., redeemable after 1909.
*Birmingham Three-and-a-half per Cent., redeemable 1946.
*Birmingham Three per Cent., redeemable 1947.
*Blackburn Three per Cent., redeemable 1930.
*Bradford Three-and-a-half per Cent., redeemable 1945.
*Bradford Three per Cent., redeemable 1954.
*Brighton Three-and-a-half per Cent., redeemable 1946.
Brighton Two-and-a-half per Cent., redeemable 1957.
*Cardiff Three-and-a-half per Cent., redeemable 1935.
Cardiff Three per Cent., redeemable 1914.
Croydon Three-and-a-half per Cent.
*Croydon Three per Cent., redeemable 1940.
*Derby Three per Cent., redeemable 1920.
Devon County Council, redeemable 1917.
*Dorset County Three per Cent., redeemable 1922.
*Dublin Three-and-a-half per Cent., redeemable 1944.
*Edinburgh Three per Cent., redeemable 1924.
*Glamorgan County Three per Cent., redeemable 1914.
*Glasgow Three-and-a-half per Cent., redeemable 1914.
*Glasgow Three per Cent., redeemable 1921.
*Glasgow Two-and-a-half per Cent., redeemable 1925.
*Grimsby Three per Cent., redeemable 1913.

* These Stocks can only be bought at or under par when redeemable within fifteen years; if a greater number of years to run, then only at 115 or under.

*Hampshire County Three per Cent., redeemable 1914.
*Hanley Three per Cent., redeemable 1913.
*Hastings Three per Cent., redeemable 1915.
Hertfordshire County Council Two-and-a-half per Cent., redeemable 1915.
*Huddersfield Three per Cent., redeemable 1934.
Hull Three-and-a-half per Cent.
*Ipswich Three per Cent., redeemable 1952.
*Leeds Two-and-a-half per Cent., redeemable 1921.
*Leicester Three-and-a-half per Cent., redeemable 1934.
Liverpool Three-and-a-half per Cent.
*Manchester Three per Cent., redeemable 1941.
*Middlesbrough Three-and-three-quarters per Cent., redeemable 1909.
*Middlesbrough Three-and-a-half per Cent., redeemable 1911.
*Middlesbrough Three per Cent., redeemable 1915.
*Middlesex County Three per Cent., redeemable 1915.
*Newcastle Three-and-a-half per Cent., redeemable 1936.
Newcastle Three-and-a-half per Cent.
*Newcastle Two-and-three-quarters per Cent., redeemable 1915.
*Newport (Mon.) Three per Cent., redeemable 1915.
*Norwich Three per Cent., redeemable 1952.
Nottingham Three per Cent.
*Plymouth Three per Cent., redeemable 1942.
*Portsmouth Three-and-a-half per Cent., redeemable 1916.
*Portsmouth Three per Cent., redeemable 1913.
Reading Three-and-a-half per Cent.
*Reading Three per Cent., redeemable 1962.
*St. Helen's Three per Cent., redeemable 1915.
*Somerset County Three per Cent., redeemable 1923.
*South Shields Three per Cent., redeemable 1945.
*Southampton Two-and-three-quarters per Cent., redeemable 1915.
*Staffordshire County Three per Cent., redeemable 1915.
*Stockport Three per Cent., redeemable 1914.
*Stockton Three per Cent., redeemable 1932.
*Stockton Three per Cent., redeemable 1915.
*Surrey County Three per Cent., redeemable 1922.

* These Stocks can only be bought at or under par when redeemable within fifteen years; if a greater number of years to run, then only at 115 or under.

Swansea Three-and-a-half per Cent.
*Swansea Three per Cent., redeemable 1955.
*Walsall Three per Cent., redeemable 1932.
*West Bromwich Three per Cent., redeemable 1930.
*West Ham Three-and-a-half per Cent., redeemable 1929.
*West Ham Three per Cent., redeemable 1945.
*West Sussex County Three per Cent., redeemable 1915.
*Wigan Three per Cent., redeemable 1921.
*Wolverhampton Three-and-a-half per Cent., redeemable 1932.
*Wolverhampton Three per Cent., redeemable 1924.
*York, redeemable 1916.

The following are subject to Ten Shillings per Cent. Stamp Duty :—

*Belfast Corporation, Three-and-a-quarter per Cent., redeemable 1924.
Blackburn Corporation Four per Cent., irredeemable.
Blackburn Corporation Three-and-a-half per Cent., irredeemable.
Bristol Corporation Three-and-a-half per Cent.
Hull Corporation Three-and-a-half per Cent.
*Leeds Corporation Four per Cent., redeemable 1927.
*Leeds Corporation Three-and-a-half per Cent., redeemable 1927.
*Leeds Corporation Three per Cent., redeemable 1927.
*Leicester Corporation Three per Cent., redeemable 1919.
Manchester Four per Cent.
*Manchester Three per Cent., redeemable 1928.
Middlesbrough Four-and-a-quarter per Cent., redeemable 1908.
*Sheffield Three-and-a-half per Cent., redeemable 1925.
*Sheffield Three per Cent., redeemable 1925.
Southampton Three-and-a-half per Cent.
*Stockton Four-and-a-quarter per Cent., redeemable 1908.

PART XIII. (*n*).

Belfast City and District Water Commissioners Three-and-a-half per Cent., redeemable 1938.

* These Stocks can only be bought at or under par when redeemable within fifteen years; if a greater number of years to run, then only at 115 or under.

APPENDIX IV.

PART A.

RULES OF THE SUPREME COURT (TRUSTEE ACT), 1893.

ORDER LIVB.—PROCEEDINGS UNDER THE TRUSTEE ACT, 1893.

1. *Chancery Division.*—All proceedings in the High Court commenced under The Trustee Act, 1893 (in this Order called "the Act"), shall be assigned to the Chancery Division of the Court.

The Trustee Act, 1893, has been amended by The Trustee Act, 1893, Amendment Act, 1894, but these Rules are obviously equally applicable to applications thereunder. As to the jurisdiction of the Chancery Division see Rules of Supreme Court, Order V., Rule 9.

2. *Petition.*—All applications under the Act may be made by petition except as otherwise provided under Order LV.

Applications under Rules of Supreme Court, Order LV., cover by far the larger number of the applications possible under The Trustee Act, 1893; hence these will (as a rule) be by originating summons, the remainder by petition. The more important and numerous applications fall under Rules of Supreme Court, Order LV., Rule 13 (*a*), as to which see *infra* (see Appendix V., Forms 18, 19, and 20).

3. *Section* 44.—An application under Section 44 of the Act may be made by the trustees authorised to dispose of the land as in the said Section mentioned.

Section 3 of The Trustee Act, 1893, Amendment Act, 1894, has amended Section 44 by inserting the words "or other person" after the word "trustee" in the first two places where it occurs in that Section. This amendment preserves

the right mortgagees had under Section 2 of 25 & 26 Vict. c. 108, which had apparently been put an end to by the repeal of that Section (see note on Section 44, *ante*, p. 140).

The application under this Section not being one of those contemplated by the Rules of Supreme Court, Order LV., and Order LV., Rule 13 (*a*) (unless it can be held to come under Order LV., Rule 2 (13) and (14), which does not appear to be the case), should be by petition, not summons (see Appendix V., Form 15, *infra*, and note thereto).

Section 44 deals with the power of the Court to sanction the sale of lands and minerals separately where "a trustee or other person is for the time being authorised to dispose of land by way of sale."

For a case under this Section see *re* Skinner (W. N. [1896] 68), where an order was made authorising the separate sale of the copyhold interest in surface and minerals under settled copyhold land. Service on a dissenting beneficiary out of the jurisdiction was dispensed with.

4. *Lodgment under Section* 42.—(1) Where a trustee desires to make a lodgment in Court under Section 42 of the Act he shall make and file an affidavit intituled in the matter of the trust (described so as to be distinguishable) and of the Act, and setting forth:

(A) A short description of the trust and of the instrument creating it.

(B) The names of the persons interested in and entitled to the money or securities, and their places of residence, to the best of his knowledge and belief.

(C) His submission to answer all such inquiries relating to the application of the money or securities paid into Court as the Court or Judge may make or direct.

(D) The place where he is to be served with any petition, summons, or order, or notice of any proceeding relating to the money or securities.

Provided that if the fund consists of money or securities being, or being part of, or representing a legacy or residue to which an infant or person beyond the seas is absolutely entitled, and on which the trustee has paid the legacy duty, or on which no duty is chargeable, the trustee may make the lodgment (without an affidavit) on production of the Inland Revenue certificate in manner prescribed by the Supreme Court Funds Rules for the time being in force.

(2) Where the lodgment in Court is made on affidavit—

(A) The person who has made the lodgment shall forthwith give notice thereof, by prepaid letter through the post, to the several persons whose names and places of residence are stated in his affidavit as interested in or entitled to the moneys or securities lodged in Court;

(B) No petition or summons relating to the money or securities shall be answered or issued unless the petitioner or applicant has named therein a place where he may be served with any petition or summons, or notice of any proceeding or order relating to the money or securities or the dividends thereof;

(C) Service of any application in respect of the money or securities shall be made on such persons as the Court or Judge may direct.*

Sub-rule 1.—Section 42 of the Act deals with the payment into Court by trustees of moneys in their hands (see *ante*, p. 130). This may be either on affidavit or without one according to the character of the fund in the trustees' hands. For the practice generally on "Payment in" (see "Daniell's Chancery Practice," pp. 2065 to 2085).

1. *Payment in on Affidavit.*—For Form of Affidavit when payment in is so made see Appendix V., Form 10.

Where the money represents a legacy or residue to which an infant or person beyond the sea is absolutely entitled, an affidavit is not necessary.

Rules 41 and 42 of the Supreme Court Funds Rules, 1894 (*infra*, pp. 223, 224), should be read in connection with these Rules. By reason of the definition of "funds" or "funds in Court" in those Rules, the funds which can be lodged in Court include—(1) Annuities or stocks in the books of the Bank of England, or any Government or Parliamentary securities, standing in the names of trustees or legal personal representatives of deceased persons, and (2) Any securities of any company having a registered office in England.

The affidavit may be written or printed; the lodgment schedule must be printed (see Supreme Court Funds Rules, 1894, Rules 5 and 41). Should it be necessary to amend the schedule it can be done by filing another affidavit with a revised schedule.

Any one of several trustees may make the affidavit (*Anon.*, 1 Jur. N. S. 974), though it is better for all to join.

* See next page for direction issued by Judges as to such applications.

2. *Payment in Not on Affidavit.*—The proviso to the rule deals with payment in in cases similar to those formerly made under Section 32 of The Legacy Duty Act, 1796 (see note on this, *supra*, p. 131). These are made without an affidavit (see Supreme Court Funds Rules, 1894, Rules 41 and 74).

Sub-rule 2 (A)—This Sub-rule puts an end to the practice based on *re* Graham's Trusts ([1891] 1 Ch. 151), which laid down that there was no necessity to serve notice on the persons mentioned in the trustees' affidavit of the payment in, who must now have notice sent them by prépaid letter.

Sub-rule 2 (B)—As to the title of any summons or petition dealing with funds in Court see Rule 5 of the Rules of the Supreme Court, February, 1895, given below. As to the extent of the jurisdiction of the Court over funds see *re* Hood's Trusts ([1896] 1 Ch. 270).

Sub-rule 2 (C).—The following direction has been issued dealing with applications as to funds lodged in Court on affidavit under this Act:—

THE TRUSTEE ACT, 1893.—THE TRUSTEE RELIEF ACTS.

DIRECTION OF THE JUDGES OF THE CHANCERY DIVISION.

We, the undersigned Judges of the Chancery Division of the High Court of Justice, direct that all applications dealing with funds lodged in Court on affidavit under The Trustee Act, 1893, or under the repealed Trustee Relief Acts, be in ordinary cases served upon the trustees and the persons named in the trustees' affidavit as interested in or entitled to the money or securities.

When a special direction is required it should be so stated on the petition or summons, and the petition should, when presented, be referred to Chambers for such direction to be given before it is answered for hearing in Court.

(Signed) J. W. CHITTY. ARTHUR KEKEWICH, J.
FORD NORTH, J. ROBERT ROMER, J.
JAMES STIRLING, J.

By Rule 5 of the Rules of the Supreme Court, February, 1895, the following Rule has been added here:—

4a. Applications to deal with funds lodged in Court under the Act shall be intituled in the same manner as the affidavit or request on which the funds were lodged. All other applications under the Act not made in any pending cause or matter shall be intituled in the matter of the trust (described so as to be distinguishable) and of the Act. Every petition or summons for a vesting order, or the appointment of a person to convey, shall state the Section or Sections of the Act under which it is proposed the order shall be made.

The Rule that the Section or Sections of the Act under which application is made for a vesting order, or the appointment of a person to convey, is to be noted in the summons or petition must be borne in mind.

5. Order LV., Rule 13 (*a*), is hereby repealed, and the following Rule shall be substituted therefor:—

ORDER LV., RULE 13 (*a*).

Summons.—Any of the following applications under The Trustee Act, 1893, may be made by summons:—

(*a*) An application for the appointment of a new trustee with or without a vesting or other consequential order.

(*b*) An application for a vesting order, or other order consequential on the appointment of a new trustee, whether the appointment is made by the Court or Judge, or out of Court.

(*c*) An application for a vesting or other consequential order in any case where a judgment or order has been given or made for the sale, conveyance, or transfer of any land or stock.

(*d*) An application relating to a fund paid into Court in any case where the money or securities in Court does or do not exceed £1000 or £1000 nominal value.

6. *Repeal.*—The following Rules are hereby repealed:—

Order LII., Rules 19, 20, 21, 22.
Order LV., Rule 2 (4), (5), (8).
Chancery Funds Amended Orders, 1874.—Orders 5, 6, 7, 8, 9, and 10.

7. *Citation.*—These Rules may be cited as "the Rules of the Supreme Court (Trustee Act), 1893," and each Rule may be cited separately according to the heading thereof with reference to the Rules of the Supreme Court, 1883. They shall come into operation on the First day of January, 1894.

5th December, 1893.

APPENDIX IV.

PART B.

SUPREME COURT FUNDS RULES, 1894.*

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I, the Right Honourable Farrer Baron Herschell, Lord High Chancellor of Great Britain, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, do hereby in pursuance of the powers contained in The Court of Chancery Funds Act 1872, The Supreme Court of Judicature Act 1875, The Supreme Court of Judicature (Funds &c.) Act 1883, The Supreme Court of Judicature (Procedure) Act 1894, and of every other power enabling me in that behalf, make the following Rules:—

I. OPERATION OF RULES AND INTERPRETATION OF TERMS.

1. *Commencement of Rules and Short Title.*—These Rules come into operation on the 1st day of January, 1895, and may be cited as "The Supreme Court Funds Rules, 1894."

2. *Repeal of existing Rules.*—All other Rules or General Orders prescribing the mode of dealing with funds in Court, and containing any provisions relating to funds in Court inconsistent with these Rules, are hereby revoked and these Rules substituted therefor, as from the same day: Provided that the Rules hereby revoked shall continue to apply to Orders made but not fully acted upon before these Rules come into operation, so far as is indispensable for the purpose of duly giving effect to such Orders.

3. *Interpretation of Terms.*—In these Rules and in Orders as herein prescribed and defined terms shall have the same meaning as the same terms are defined to have in the Rules of the Supreme Court, 1883, and the following words shall have the several meanings hereby assigned to them: viz.—

"Paymaster" means Her Majesty's Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature, or the Assistant Paymaster-General for Supreme Court business for the time being deputed by the Paymaster-General to act on his behalf for such business:

"Pay Office" means the Paymaster-General's Office for business of the Supreme Court of Judicature:

"Pay Office Account" means the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature:

"Audit Office" means the Office of the Comptroller and Auditor General in which the audit of the accounts of the Pay Office is conducted:

"Bank" means the Bank of England, or the Governor and Company of the Bank of England, and includes for District Registry purposes the branch banks of the Bank of England in Liverpool and Manchester:

"Company" includes corporation or body corporate:

"Person" includes a firm:

"Government Securities" means New Consols, or £2¾ per centum Annuities, or £2½ per centum Annuities, or Local Loans Stock:

"Funds" or "funds in Court" means any money, Government Stock or annuities, or other securities, or any part thereof standing or to be placed to the Pay Office Account in the books of the Bank of England or of any other company, and includes boxes and other effects:

"Lodge in Court" means pay or transfer into Court, or deposit in Court:

"Lodgment in Court" means payment or transfer into Court, or deposit in Court:

"Title of the cause or matter" means the short title of the cause or matter, with the reference to the Record:

"Ledger credit" means the title of the cause or matter and the separate account (if any) opened or to be opened under an Order or otherwise, in the books of the Paymaster, to which any funds are credited or to be credited:

"Order" means an Order of the Supreme Court of Judicature or of the High Court of Justice or Court of Appeal, whether made in Court or in Chambers, and an Order in Lunacy, and includes a judgment or decree, and a report of a Master in Lunacy, confirmed by fiat, and thereby receiving the operation of an Order under the Lunacy Regulation Acts for the time being in force, or any general Order made thereunder; and a certificate of a Master in Lunacy to be acted on without further Order; and includes the Schedule or Schedules to an Order:

"Direction" means any cheque, draft, or authority issued to the Bank of England, or to any other Company, which relates to money or securities standing or to be placed to the Pay Office Account; and includes any authority for the payment of money through the agency of the Post Office:

"Court" means the Supreme Court of Judicature or the High Court of Justice or any Division thereof, or the Court of Appeal:

"Registrar" means a Registrar of the Chancery or of the Probate, Divorce, and Admiralty Divisions of the High Court of Justice, and a Registrar in Bankruptcy; also the District Registrars of the Court in Liverpool and Manchester; and includes the officer whose duty it may be under any General Orders in Lunacy for the time being in force to draw up and issue Orders in Lunacy:

"Chief Clerk's certificate" or "certificate of a Chief Clerk" means a certificate made by a Chief Clerk of the Chancery Division of the Court or by a District Registrar of the Court in Liverpool or Manchester acting as a Chief Clerk:

"Taxing Officer" means a Taxing Master in the Chancery Division of the Court, and the Master or person whose duty it is to tax the costs in the other Divisions or in Lunacy:

"National Debt Commissioners" means the Commissioners for the reduction of the National Debt:

"Statutory declaration" means a declaration under The Statutory Declarations Act, 1835 (5 & 6 Will. IV. c. 62), subject to the provisions of 44 & 45 Vict. c. 41, s. 68:

In causes and matters proceeding in a District Registry "Master," "Chief Clerk," and "Taxing Officer" mean District Registrar:

Words importing the singular number only include the plural number, and words importing the plural number only include the singular number:

Words importing males include females.

II. Preparation of Orders in the Chancery Division and in Lunacy to be acted upon by the Paymaster, and particulars relating thereto.

4. *Application of Rules* 5 *to* 27 *inclusive.*—The Rules next following, numbered severally 5 to 27 inclusive, shall apply only to causes and matters in the Chancery Division, and (so far as the same are applicable) to matters in Lunacy.

5. *Order for funds to be brought into Court to have a Lodgment Schedule.*—Every Order which directs funds to be lodged in Court shall have annexed thereto as part thereof a Schedule, to be styled the Lodgment Schedule, which shall be headed with the title of the cause or matter, the date of the Order, and the title of the ledger credit to which the funds are to be placed; and shall set out in a tabular form:—

(*a*) The name, or a sufficiently identifying description of the person by whom the funds are to be lodged:

(*b*) The amount, if ascertained, and the description of the funds.

The authority for a lodgment of the proceeds of the sale of any property which has been directed by an Order to be sold, and for a lodgment of Receivers' balances, may be a Lodgment Schedule signed by a Chief Clerk; and such Lodgment Schedule shall operate in the same manner as a Lodgment Schedule annexed to an Order.

The Lodgment Schedule shall be prepared upon a printed form according to the Form No. 1 in the Appendix to these Rules (see p. 244), and as nearly as may be in the manner shown by the specimen entries appended to such Form; and may direct the investment and accumulation of the funds or the

dividends or interest on the funds to be lodged; and may also direct that the funds shall not be dealt with without notice to the purchaser or other person named in such Schedule.

6. *Order for funds to be paid out &c. to have a Payment Schedule.*— Every Order which directs funds in Court to be paid, sold, transferred, or delivered, or carried over to any other ledger credit than that to which the same are standing, or to be otherwise dealt with by the Paymaster, shall have annexed thereto as part thereof a Schedule, to be styled the Payment Schedule, which shall be headed with the title of the cause or matter, the date of the Order, and the ledger credit to which the funds dealt with are standing. The Payment Schedule shall contain as part of the heading a statement of the funds with which, or with part of which, or with the interest or dividends on which the Paymaster is to deal, describing them if already in Court as they appear in the Paymaster's certificate, or if not already in Court stating the source from which they are to be derived. The Payment Schedule shall set out in a tabular form:—

(*a*) The name of each person to whom a payment, transfer, or delivery of any funds is to be made: unless the name is to be stated in a certificate of a Chief Clerk or a Master in Lunacy or a Taxing Officer, or unless such payment, transfer, or delivery is to be made to trustees or other persons in succession, or to representatives when no probate or letters of administration shall have been taken out at the date of the Order. The name shall be in full (the Christian name preceding the surname) except in the case of a payment to a firm, when the business title of such firm may be stated; and when a payment is to be made to a person named in the Schedule, the address (if known at the time of preparing the Schedule) of such person, or in the case of a payment to two or more persons jointly of one of such persons, shall be stated in the Schedule:

(*b*) The title of the ledger credit or separate account to which any funds are to be carried over:

(*c*) The amount and description of the funds in each case to be paid, sold, transferred, delivered, or carried over, so far as the same can be ascertained at the date of the Order, except in the case of aliquot parts of an ascertained amount; and where the actual amounts to be dealt with cannot be ascertained at the date of the Order, and are not to be subsequently ascertained by any means provided for by the Order or by these Rules, the aliquot parts to be dealt with:

(*d*) The nature and necessary particulars of any other dealings with such funds by the Paymaster.

In the body of the Schedule short descriptions may be used, and it shall not be necessary to add that the specific amounts dealt with form part of the larger amount of any like funds mentioned in the heading. The word "interest" in the Schedule shall, unless otherwise specified, mean the dividends and interest on all the funds mentioned in the heading.

The Payment Schedule shall be prepared upon a printed form according to the Form No. 2 in the Appendix to these Rules (see p. 246), and as nearly as may be in the manner shown by the specimen entries appended to such Form.

7. *When a separate account is opened.*—When funds in Court are by an Order directed to be carried over to a separate account, the title of the ledger credit to be opened for the purpose shall, unless the Order otherwise directs, commence with the title of the cause or matter to which such funds are standing.

8. *When both a Lodgment and Payment Schedule to be annexed.*—Every Order which directs or authorises the lodgment of funds in Court and also deals with such funds or any part thereof, or with any funds already in Court to the same ledger credit, shall have annexed thereto as part thereof a combined Lodgment and Payment Schedule, in the Form No. 3 in the Appendix to these Rules (see p. 248).

9. *Separate Schedule for each ledger credit.*—When funds to be lodged in Court under an Order are by the same Order directed to be placed to two or more ledger credits, separate Lodgment Schedules shall be made out for such respective ledger credits; and when funds standing to two or more ledger credits are dealt with by the same Order, separate Payment Schedules shall be made out for such ledger credits respectively.

10. *Instructions to Paymaster to be solely contained in Schedule.*—The Lodgment and Payment Schedules respectively shall contain the whole of the instructions intended by the Orders of which they severally form part to be acted upon by the Paymaster, and all particulars necessary to be known by him, so far as such instructions and particulars are capable of being expressed at the date of the Order, and the Paymaster shall only be responsible for giving effect to such instructions so intended to be given by the Order as are expressed in the Lodgment or Payment Schedule thereto. The instructions and particulars contained in a Lodgment or Payment Schedule shall not be set forth in the body of the Order, but shall only be therein referred to as appearing by the Schedule, unless for any special cause it shall, in the opinion of the Judge by whom the Order is made, or the Registrar by whom the same is drawn up, be necessary to set forth some part of such instructions or particulars both in the body of the Order and in the Schedule.

11. *When sums are to be ascertained by certificate &c.*—When an Order directs any sums to be ascertained by the certificate of a Chief Clerk or Taxing Officer, or a Master in Lunacy, or in any other manner, and to be afterwards dealt with by the Paymaster, it shall be so expressed in the Payment Schedule; and such certificate or other authority, or a duplicate or an office copy of the same, or of so much thereof as shall be necessary, shall be sent to the Paymaster. Such certificate shall be printed, or partly printed, and as nearly as may be in the Form No. 4 appended to these Rules (see p. 248).

12. *Certificate for payment of taxed costs.*—When an Order directs payment out of a fund in Court of any costs directed to be taxed by a Taxing Officer, the Taxing Officer shall state in his certificate the name and address of the person to whom such costs are payable. Such certificate shall be printed, or partly printed, and as nearly as may be in the Form No. 5 appended to these Rules (see p. 249), and a duplicate or an office copy thereof shall be sent to the Paymaster.

13. *Interest how ascertained.*—When interest not directed to be certified is payable in respect of any money in Court directed by an Order to be dealt with by the Paymaster, there shall be stated in the Payment Schedule the rate per centum at which, and (if the day to which interest is payable can be fixed by the Order) the day (inclusive) to which such interest is to be computed, and the amount of such interest.

14. *When the day to which interest is payable cannot be ascertained.*—If the day to which interest is payable cannot be fixed by the Order, the day from which (exclusive) such interest is to be computed shall (except in the case of a computation of subsequent interest in the certificate of a Chief Clerk, or a Master in Lunacy) be stated in the Payment Schedule, and such interest may be directed to be computed and certified by a Chief Clerk, or a Master in Lunacy, or (where the computation is dependent upon the taxation of costs) by a Taxing Officer.

15. *When interest certified by a Chief Clerk &c.*—Interest certified by a Chief Clerk, or a Master in Lunacy, or a Taxing Officer, may, unless the Order otherwise directs, be computed to a day subsequent to the date of the certificate and to be named therein as the day for payment, so as to allow a reasonable time for doing all necessary acts to enable the payment to be made; and the Chief Clerk, or Master in Lunacy, or Taxing Officer may, if he thinks fit, require a statement in writing of such computation, authenticated by the signature of the solicitor of the person having the carriage of the Order, to be produced before preparing the certificate, but no affidavit verifying such computation shall be required.

16. *When interest to be ascertained by affidavit.*—When the day for payment is not fixed by the Order, and the interest is not directed to be certified as in the last preceding Rule mentioned, such interest shall, without any provision in the Order for that purpose, be ascertained by an affidavit, or by a statutory declaration, in which case such interest shall be computed to a day (inclusive) to be named in such affidavit or declaration as the day for payment, which day shall not be more than fourteen days after the day of swearing such affidavit or making such declaration; and such affidavit or declaration shall be a sufficient authority to the Paymaster to pay or apply the amount of interest so ascertained in the manner directed by such Order.

17. *Deduction of income tax from interest.*—In every case in which interest is to be computed, income tax (if any) shall, in making such computation, be deducted therefrom at the rate payable during the time such interest accrues,

unless the Order otherwise directs; and if income tax has been deducted, it shall be so stated in every such affidavit or declaration as is mentioned in the last preceding Rule.

18. *When dealings by the Paymaster are made contingent upon the execution of particular documents.*—Whenever the dealing by the Paymaster with funds in Court is, by an Order, made contingent upon the execution of some document, it shall be so expressed in the Payment Schedule. The execution of such document shall be certified by a Master in Lunacy or by a Chief Clerk: provided that in the case of a document in existence at the date of the Order and sufficiently identified in the Schedule, the execution may be directed to be verified by affidavit. Such certificate or affidavit shall state the particular amount of funds to be dealt with, and such certificate shall be printed, or partly printed, and as nearly as may be in the Form No. 6 appended to these Rules (see p. 250).

19. *Periodical payments.*—When an Order directs the payment of dividends, annuities, or other periodical payments to be made by the Paymaster, there shall be stated in the Payment Schedule (except in the case of dividends payable as they accrue due), the time when the first of such payments and all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, are to be made.

20. *Legacy, estate, and succession duty.* — When an Order directs the payment, transfer, or delivery of funds in Court, in respect of which duty shall be payable to the revenue under the Acts relating to legacy or estate or succession duty, and does not direct the payment of such duty, it shall be stated in the Payment Schedule that such payment, transfer, or delivery is subject to duty, and in such case the Paymaster is to have regard to the circumstance that such duty is payable; and when by an Order funds in respect of which such duty may be chargeable are directed to be invested, carried over, or placed to a separate account, the words "subject to duty" shall be added in the Schedule to the separate account directed to be opened.

21. *Payment, transfer, or delivery to trustees &c.*—When a person to whom payment, transfer, or delivery of funds in Court is directed is entitled thereto as real estate, or as trustee, executor, or administrator, or otherwise than in his own right or for his own use, the fact that he is entitled to the same as real estate, or the character in which he is so entitled, shall be stated in the Payment Schedule to the Order, or in the certificate of a Chief Clerk, or of a Taxing Officer, or of a Master in Lunacy.

22. *Draft Schedule to be prepared by party having conduct of proceedings.*—When an Order is made dealing in any way with funds in Court or to be brought into Court in accordance with minutes agreed upon by the parties, the solicitor of the party whose duty it is to procure the Order to be drawn up and entered shall prepare and lodge with the Registrar or other proper officer, for his consideration, draft Lodgment and Payment Schedules, as the case may be, in the same form as the Lodgment and Payment Schedules to an Order, and

containing the particulars, so far as the same have been ascertained, which are required by these Rules to be contained in the Lodgment and Payment Schedules of the Order.

23. *Orders how drawn up and entered.*—Every Order which is to be acted upon by the Paymaster shall be drawn up and entered by the Registrar, unless the Judge otherwise directs, and shall either be wholly printed, or, in cases in which printed forms can be used, may be partly in print and partly in writing.

24. *Copy of Schedules for Paymaster.*—When any Order to be acted upon by the Paymaster is left for entry, a further copy of the Schedules thereto, initialled by the Registrar and stamped with his official seal on every leaf, shall be left therewith. Such further copy of the Schedules shall be examined and sealed and marked with a reference to the Order as entered, and shall be sent to the Paymaster.

A copy of a Lodgment Schedule signed by a Chief Clerk (under Rule 5 of these Rules) shall be sent to the Paymaster by the Chief Clerk.

25. *Paymaster to act on copy of Schedules.*—The copy of the Schedules to an Order sent to the Paymaster pursuant to the last preceding Rule shall be the Paymaster's authority for giving effect to the several operations directed therein. No part of the Order other than the Schedules thereto shall be sent to the Paymaster.

26. *Additional copies of printed Orders.*—Additional printed copies of Orders or Schedules may be made according to the requirements of the parties or their solicitors, and when such Orders have been entered, such additional copies shall be transmitted to the Central Office, and upon being duly completed and signed or certified by the proper officer, may be issued as office or certified copies.

27. *Amendment of accidental errors in printed Orders.*—Clerical mistakes or errors, or accidental omissions in printed Orders, may be amended in writing: Provided that no amendment shall be made in any Order to provide for a new state of circumstances arising after the date of the Order; nor shall any Order be amended for the purpose of extending the time thereby limited for making any lodgment of funds in Court.

When any such amendment is made in a Schedule to an Order, the copy of such Schedule to be sent to the Paymaster under Rule 24 (if not already so sent) shall be amended and sealed in the manner above provided. If such copy has prior to the amendment been sent to the Paymaster, a notification of the amendment, signed by a Registrar, shall be delivered to the solicitor having the carriage of the Order, who shall leave such notification at the Pay Office, and produce therewith the amended Order; and the Paymaster shall note such amendment on his copy of the Schedule and act in accordance therewith.

III. Form of Orders for the Payment of Money in the Queen's Bench and Probate, Divorce, and Admiralty Divisions.

28. *Form of Orders in Queen's Bench and Probate, Divorce, and Admiralty Divisions.*—In the Queen's Bench and Probate, Divorce, and Admiralty Divisions an Order for the payment of money to be acted upon by the Paymaster shall be in the Form No. 7 in the Appendix to these Rules (see p. 251), or as nearly as may be, and shall be signed by a Master or a Registrar, or by an Official Referee, or by a Clerk of Assize, or an Associate, as the case may be.

IV. Lodgment of Funds in Court.

29. *All funds lodged in Court to be placed to the account of the Paymaster.*—All funds to be paid into or deposited in Court shall be paid or deposited at the Bank of England (Law Courts Branch), or in the case of funds to be lodged in Court in the District Registries of the High Court in Liverpool or Manchester at the branch banks of the Bank of England in Liverpool or Manchester, and placed in the books of the Bank to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature; and the Bank shall cause a receipt to be given to the person making the payment or deposit.

All securities to be transferred into Court shall be transferred to the said account in the books of the Bank or other company in whose books such securities are registered.

Any effects brought to the Bank to be so deposited in Court shall be deposited in locked boxes, or in such other secure manner as shall satisfy the Bank; and before taking custody of a box the agent, or other officer acting on behalf of the Bank, may at his discretion require an inspection of its contents in presence of the person depositing it.

Cheques for lodgment of money are to be made payable to the Bank of England (Law Courts Branch) for the account of the Paymaster-General, and not to the Paymaster personally.

30. *Manner of lodgment of funds in Chancery Division, and particulars to be stated in request.*—In the Chancery Division a direction for a lodgment directed by an Order, or in a Lodgment Schedule signed by a Chief Clerk (in the case of purchase moneys or receivers' balances), shall be issued by the Paymaster upon receipt of a copy of the Lodgment Schedule; and a direction for a lodgment under The Trustee Act, 1893, shall be issued by him upon receipt of an office copy of the Schedule mentioned in Rule 41, or upon receipt of the request and certificate of the Commissioners of Inland Revenue mentioned in that Rule.

The Paymaster, on a request to that effect signed by or on behalf of a person directed by an Order to make a lodgment, may issue a separate direction for lodgment of a part of the sum so directed to be lodged: Provided that the Paymaster shall not further deal, under such Order or under these Rules, with the amount so lodged until the full lodgment directed by the Order has been made; and provided that such lodgment of part of a sum shall not affect or

prejudice any liability, process, or other consequences which such person may have become subject to by reason of his default in not lodging the whole sum.

Directions for lodgments in the branch banks of the Bank of England in Liverpool or Manchester may be issued by the District Registrars of the Court in Liverpool and Manchester.

A lodgment of funds in Court not directed by an Order may be made upon a direction to the Bank or other company, to be issued by the Paymaster on a request signed by or on behalf of the person desiring to make such lodgment: Provided that no such lodgment shall be placed in the Pay Office books to a separate account in a cause or matter (except to a security for costs account) unless an Order has directed such separate account to be opened.

The request for a direction under this Rule shall state the name of the person by or on whose behalf the funds are to be lodged, the ledger credit in the Pay Office books to which the funds are to be placed, and the date of the authority or certificate (if any) in pursuance of which the funds are to be lodged.

In cases of funds to be lodged in pursuance of The Lands Clauses Consolidation Act, 1845, or of the Copyhold Acts, the further particulars required under Rules 39 and 40 shall be stated in the request. And when (otherwise than as hereinbefore provided) funds are lodged in Court in pursuance of an Act of Parliament, under which some specific authority is necessary for such lodgment, the request for a direction for lodgment shall contain a reference to such Act and authority, and the requisite authority shall be left at the Pay Office.

Except in the cases next mentioned, the requests under this Rule shall be in the Forms No. 8 (for money) and No. 9 (for securities) in the Appendix in these Rules (see pp. 251, 252).

Lodgments under Orders XXII. and XXXI. of R. S. C., 1883.—When money is to be lodged under the provisions of Order XXII. of the Rules of the Supreme Court, 1883 (in any action brought to recover a debt or damages), or under the provisions of Rule 26 of Order XXXI. of the said Rules, the request shall be in the Form No. 10 in the Appendix to these Rules (see p. 253), and shall contain a statement of the circumstances under which the money is to be lodged, in such of the following terms as may be applicable to the case, viz.:—

(*a*) When the money is to be lodged subject to the provisions of Rule 5 of Order XXII., a statement in the following terms:—"Paid in on behalf of defendant in satisfaction of claim of above-named [*name of party*]" (*or* "with defence setting up tender").

(*b*) When the money is to be lodged subject to the provisions of Rule 6 of Order XXII., a statement in the following terms:—"Paid in on behalf of defendant against claim of above-named [*name of party*], with defence denying liability."

(*c*) When the money is to be lodged under the provisions of Rule 26 of Order XXXI., a statement in the following terms:—"Paid in to security for costs account on behalf of [*name of party*]."

31. *Conditional lodgment of money at the Bank in urgent cases.*—When it is desired to bring money into Court in the Chancery Division, whether under an Order or otherwise, without waiting the time necessary to obtain a direction for the Bank to receive such money, it may be lodged at the Bank to the credit of a Supreme Court Suspense Account (subject to being dealt with as hereinafter mentioned, and not otherwise), upon an application signed by the person desiring to lodge the same, or his solicitor, and addressed to the Bank, specifying the amount, and the title of the ledger credit to which it is desired to be lodged, and upon such lodgment being made one of the cashiers of the Bank shall give a certificate that the amount has been lodged to the credit of the said Suspense Account; and in every case the person making such lodgment, or his solicitor, shall forthwith request the direction of the Paymaster for the Bank to receive the money in the manner provided by the last preceding Rule, and shall leave such direction at the Bank for the purpose of having the money so previously lodged transferred to the Pay Office Account, and placed in the books of the Pay Office to the ledger credit mentioned in such direction.

32. *Manner of lodgment of funds in the Queen's Bench Division.*—In the Queen's Bench Division a lodgment of money to the account of the Paymaster shall be made on presentation at the Bank (Law Courts Branch) of a request signed by or on behalf of the person desiring to make such lodgment. Such request for lodgment shall be in the Form No. 11 in the Appendix to these Rules, (see p. 254), or as nearly as may be, and shall specify the title of the cause or matter to the credit of which the lodgment is to be placed, and shall also contain a statement of the circumstances under which the money is lodged in such of the following terms as may be applicable to the case, viz. :—

(*a*) When the money is to be lodged subject to Rule 5 of Order XXII. of the Rules of the Supreme Court, 1883, a statement in the following terms:—"Paid in on behalf of defendant in satisfaction of claim of above-named [*name of party*]" (*or* "with defence setting up tender").

(*b*) When the money is to be lodged subject to Rule 6 of Order XXII. of the Rules of the Supreme Court, 1883, a statement in the following terms:—"Paid in on behalf of defendant against claim of above-named [*name of party*] with defence denying liability."

(*c*) When the money is to be lodged under Rule 26 of Order XXXI. of the Rules of the Supreme Court, 1883, a statement in the following terms: "Paid in to security for costs account on behalf of [*name of party*]."

(*d*) When the money is to be lodged in pursuance of an Order or otherwise than as above specified, a statement of the nature and date of the authority under which the lodgment is made, as for instance: —"Paid in under Order dated the day of 18 " (*or* "Paid in on notice of appeal [in Bankruptcy], dated the day of 18 ").

If the lodgment is made upon a notice or pleading, such notice or pleading must be produced at the Bank, and the receipt for the lodgment shall be given thereon; and if the lodgment is made in pursuance of an Order, such Order, or an office copy thereof, must be produced at the Bank by the person making the lodgment.

A lodgment of funds other than money shall be made upon a direction to be issued by the Paymaster upon receipt of a copy of the Order directing such lodgment.

33. *Lodgments under Orders XXII. and XXXI. to be distinguished in Pay Office books.*—In every case of a lodgment in the Chancery and Queen's Bench Division under the provisions of the said Orders XXII. and XXXI., as provided in the preceding Rules 30 and 32, the Paymaster shall cause an entry to be made in his books indicating the circumstances under which the money is stated to be lodged.

34. *Manner of lodgment of funds in Probate, Divorce, and Admiralty Division: such lodgments to be notified to Registrar.*—In the Probate, Divorce, and Admiralty Division a lodgment of funds to the account of the Paymaster shall be made upon presentation at the Bank (Law Courts Branch) of an authority signed by or on behalf of a Registrar. Such authority shall be issued upon a request signed by or on behalf of the person desiring to make such lodgment. The request shall specify the title of the cause or matter (which in Admiralty actions shall include the name of the ship), and any particulars of the lodgment which may be necessary, and shall be in the Form No. 12 in the Appendix to these Rules (see p. 254).

When the receipt of funds authorised to be lodged as above has been certified to the Paymaster by the Bank, the Paymaster shall cause a notification of the lodgment to be sent to the Registrar by whom or on whose behalf such lodgment was authorised.

35. *Requests and directions may be sent by post.*—A request or authority for the issue by the Paymaster of a direction for the lodgment of funds in Court may be sent to the Paymaster by post, and if so desired by the person sending the same the Paymaster shall send such direction by post to the address specified by such person.

36. *Persons may bring funds into Court in Chancery Division though time limited by Order has expired.*—A person directed by an Order in the Chancery Division to make a lodgment in Court shall be at liberty to make the same without further Order, notwithstanding the Order may not have been served, or the time thereby limited for making such lodgment may have expired; and if any further sum of money has by reason of such default become payable by such person for interest, or in respect of dividends, he shall be at liberty to lodge in Court such further sum upon a request as hereinbefore provided: Provided that any such subsequent lodgment shall not affect or prejudice any liability, process, or other consequences which such person may have become subject to by reason of his default in making the same within the time so limited.

37. *Upon receipt or transfer of funds, direction to be returned to Paymaster.* —When funds have been received by the Bank, and when securities have been transferred in the books of the Bank or any other company to the Pay Office Account in accordance with a direction, the Bank or other company shall forthwith send such direction to the Paymaster with a certificate thereon that the funds specified have been received or transferred as therein authorised, and (in the case of such other company) shall therewith send the stock or share certificate (if any) of the securities so transferred.

38. *Certificate of lodgment in Chancery Division to be filed.* — In the Chancery Division, when any direction or other authority for the lodgment of funds in Court is returned to the Paymaster, with a certificate thereon that the funds therein mentioned have been lodged, the Paymaster shall as soon as practicable file at the Central Office a certificate of such lodgment, and shall therein state the ledger credit to which such funds have been placed in the books at the Pay Office; and an office copy of such certificate of the Paymaster shall be received as evidence of the lodgment.

Certificates or notifications of lodgments at the branch banks of the Bank of England in Liverpool and Manchester (in Chancery and Admiralty causes and matters) shall be transmitted by the Paymaster to the respective District Registrars, and shall be filed in the District Registries (instead of in the Central Office).

39. *When money is lodged under Act* 8 *Vict. c.* 18, *s.* 69, *disability to be stated.*—Money lodged in Court in the Chancery Division pursuant to the 69th Section of The Lands Clauses Consolidation Act, 1845, in respect of lands in England or Wales, shall be placed in the books at the Pay Office to the credit of "Ex parte the promoters of the undertaking," in the matter of the special Act (citing it), and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, which particulars shall be stated in the request for the direction for the lodgment.

40. *Money lodged under the Copyhold Acts to be specially described.*—Money lodged in Court in the Chancery Division pursuant to the Copyhold Acts shall be placed in the books at the Pay Office to the credit of "Ex parte the Board of Agriculture," and of the particular manor in respect of which the money shall be so paid in; and in the request for a direction for the lodgment the name and locality of such particular manor shall be stated.

41. *Lodgments under The Trustee Act,* 1893.—When a legal personal representative desires to lodge funds in Court under The Trustee Act, 1893, without an affidavit, he shall leave with the Paymaster a request signed by him or his solicitor, with a certificate of the Commissioners of Inland Revenue; such request and certificate to be in the Form No. 16 in the Appendix to these Rules (see p. 258), with such variations as may be necessary, or, as regards such certificate, in such other form as shall from time to time be adopted by the said

Commissioners with the consent of the Lords Commissioners of Her Majesty's Treasury. The money or securities so lodged shall be placed to the credit mentioned in such request.

When a trustee or other person desires to lodge funds in Court under The Trustee Act, 1893, upon an affidavit, he shall annex to such affidavit a Schedule in the same printed form as the Lodgment Schedule to an Order, setting forth:—

(*a*) His own name and address:

(*b*) The amount and description of the funds proposed to be lodged in Court:

(*c*) The ledger credit in the matter of the particular trust to which the funds are to be placed:

(*d*) A statement whether legacy or estate or succession duty (if chargeable) or any part thereof has or has not been paid:

(*e*) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

An office copy of such Schedule is to be left with the Paymaster.

41a. *Lodgment under Life Assurance Companies (Payment into Court) Act*, 1896.—Where a company desires to lodge money in Court under The Life Assurance Companies (Payment into Court) Act, 1896, there shall be annexed to the affidavit directed to be made by Order LIVc., Rule 1, of the Rules of the Supreme Court, or any substituted Rule, a Lodgment Schedule, stating the title and address of the company, the amount of the money proposed to be lodged, and the ledger credit to which it is to be placed. Such ledger credit shall be as follows, with any necessary variations:—"In the matter of the Policy No. of the Company." An office copy of the Schedule is to be left with the Paymaster.

On receipt by the Paymaster of any subsequent notice of claim transmitted by such company pursuant to their undertaking referred to in Sub-section (*e*) of the said Rule, he shall retain the same, and make an entry thereof in his books, and on any certificate of the fund to which such notice refers he shall notify the name of the person giving such notice and the date thereof.

The Paymaster shall also upon such request as is mentioned in Rule 100, and upon payment of the same fee as is payable for a transcript under that Rule, supply a copy of such notice.

42. *Credit to which proceeds of securities and dividends are to be placed.*—Any principal money or dividends received by the Bank in respect of securities standing to the Pay Office Account shall be placed in the books at the Pay Office, in the case of principal money to the credit to which the securities whereon such money arose were standing at the time of the receipt thereof, and in the case of dividends to the credit to which the securities whereon such dividends accrued were standing at the time of the closing of the transfer books of such securities previously to the dividends becoming due.

V. Appropriation in the Queen's Bench Division of Money lodged under Order XIV.

43. *Appropriation of money lodged under Order XIV. of the Rules of the Supreme Court*, 1883.—In the Queen's Bench Division, when a defendant has lodged money in Court under Order XIV. of the Rules of the Supreme Court, 1883, as a condition of liberty to defend, and desires to appropriate the whole or any part of such money to the whole or any specified portion of the plaintiff's claim pursuant to Rule 11 of Order XXII. of the said Rules, he or his solicitor shall leave at the Pay Office a notice of such appropriation in the Form No. 13 in the Appendix to these Rules (see p. 255), specifying the title of the cause or matter to the credit of which the money is standing, the date of the Order under which the money was lodged in Court, and the amount to be appropriated; and whether so appropriated (*a*) in satisfaction of a claim, or (*b*) against a claim, with a defence denying liability; and thereupon, for the purposes of payment out of Court, the money mentioned in the notice shall be subject to the next following Rule. The person leaving such notice must produce therewith the original receipt of the Bank for the amount lodged.

VI. Payment, Delivery, and Transfer of Funds out of Court, and other Dealings with Funds.

44. *Payment out of Court of money lodged under Orders XXII. and XXXI. of the Rules of the Supreme Court*, 1883.—In the Chancery and Queen's Bench Divisions, when money has been lodged under Orders XXII. and XXXI. of the Rules of the Supreme Court, 1883 (as described in Rules 30 and 32 of these Rules), and when so far as money lodged under Order XIV. of the said Rules of the Supreme Court has been appropriated in the manner provided in the last preceding Rule, payment of the money shall be made to the person in satisfaction of whose claim it has been lodged, or to the person otherwise entitled thereto, or, on the written authority of either such person respectively, to his solicitor, as under (unless an Order restraining such payment has been lodged at the Pay Office prior to the issue of the Paymaster's direction for payment):—

(*a*) When the money has been lodged or appropriated in satisfaction of a claim (or with defence setting up tender), under Rules 30 (*a*) and 32 (*a*) of these Rules, or the last preceding Rule, a direction for payment shall be issued by the Paymaster upon a request or authority in the Form No. 14A in the Appendix to these Rules (see p. 255), or as nearly as may be.

(*b*) When the money has been lodged or appropriated against a claim, with a defence denying liability, under Rules 30 (*b*) and 32 (*b*) of these Rules, or the last preceding Rule, a direction for payment shall be issued by the Paymaster upon receipt of a notification that the plaintiff accepts the sum lodged in satisfaction, and that due

notice has been given of such acceptance, and upon a request or authority for payment of the same; such notification and request or authority to be in the Form No. 14B in the Appendix to these Rules (see p. 256), or as nearly as may be.

(*c*) When the money has been lodged to a Security for Costs Account under Rules 30 (*c*) and 32 (*c*) of these Rules, a direction for payment shall be issued by the Paymaster upon receipt of a certificate of a Taxing Officer, Master, or Chief Clerk (as the case may be) as to the person who is entitled to have paid out to him the money so lodged; such certificate to be printed, or partly printed, and as nearly as may be in the Form No. 14C appended to these Rules (see p. 257).

When a request is made for payment of money lodged in the Chancery and Queen's Bench Divisions on a notice or pleading, the original receipted notice or pleading must, whenever so required, be produced at the Pay Office.

In the Probate, Divorce, and Admiralty Division when money has been lodged to a Security for Costs Account, under the provisions of Rule 26 of Order XXXI. of the Rules of the Supreme Court, 1883, a direction for payment shall be issued by the Paymaster upon receipt of a certificate or other authority of a Registrar as to the person entitled to payment of the money so lodged.

Except as in this Rule is provided, the money so lodged or appropriated as mentioned herein shall only be paid out in pursuance of an Order.

45. *In other cases funds to be dealt with only in pursuance of an Order.*—Except as provided in the last preceding Rule, and subject to the provisions contained in Rules 55, 56, 57, 70, 73, 74, and 109, funds in Court shall not be paid, delivered, or transferred out of Court, nor invested, sold, or carried over, unless in pursuance of an Order, or in the case of an investment of money or application of dividends unless in pursuance of an authority contained in a certificate of a Master in Lunacy.

46. *A copy of every Order dealing with funds in the Queen's Bench and Probate, Divorce, and Admiralty Divisions to be left at the Pay Office.*—A duly authenticated copy of every Order in the Queen's Bench and Probate, Divorce, and Admiralty Divisions which directs funds to be dealt with shall be left at the Pay Office, by or on behalf of the person entitled to payment or interested in any other dealing with such funds directed or authorised by the Order, and shall be the Paymaster's authority for the issue of directions giving effect to such Orders.

47. *Paymaster to prepare directions giving effect to Orders upon receipt of the necessary authority and information.*—The directions of the Paymaster for the payment of money under these Rules, and for the delivery of securities out of Court in pursuance of an Order, shall be prepared by the Paymaster forthwith, or from time to time, upon receipt of a copy of the Order and any further necessary authority or information; and, except as provided in the next following Rule, such directions shall be delivered upon the personal application of the persons entitled thereto.

Investments of money, transfers of securities out of Court, and carrying over of funds, in pursuance of an Order, shall be made by the Paymaster upon receipt of the necessary authority and information.

Sales of securities in pursuance of an Order of which a copy has been received in the Pay Office shall be made by the Paymaster upon application by or on behalf of the persons interested therein, and such application may be sent by post.

48. *Payments may be made by Post.*—Subject to the conditions as to limitation of amount and otherwise in this Rule mentioned, and to any variation of such conditions which the Treasury may from time to time direct, persons entitled to payment of money may receive from the Paymaster, by post, a direction or other document by which payment may be obtained:—

(*a*) When money, not exceeding a sum of £1000 (other than a periodical payment hereunder in this Rule mentioned), is payable to a person having an account at a bank in the United Kingdom, whose name and address are stated in the Order or other authority under which the money is payable, or in a certificate of a Chief Clerk, or of a Taxing Officer, or of a Master in Lunacy, to be acted upon by the Paymaster, or whose address, in the case of a payment under an Order in the Chancery Division, is certified to the Paymaster by a solicitor having carriage of the Order which authorises the payment, the Paymaster shall remit the same by post to such person to the address so stated, upon receipt of a request to that effect in the prescribed form, in which is specified the name of the bank at which the money is to be placed to the account of such person. The Paymaster's direction for payment will be payable to the order of such person; it will be specially crossed to his account at the named bank, and will not be negotiable.

(*b*) When money, not exceeding a sum of £500 (other than a periodical payment hereunder in this Rule mentioned), is payable to a person residing within the United Kingdom, who has not an account at a bank, or whose address is not ascertained by the Paymaster in the manner above prescribed, the Paymaster shall remit the same by post to such person upon receipt of a request to that effect in the prescribed form, signed by such person and attested by a justice of the peace, or a commissioner to administer oaths, or a clerk in holy orders, or a notary public. The Paymaster's direction for payment will be sent to the address stated in the request, and will be crossed so as to be payable only through a banker.

(*c*) When money, not exceeding a sum of £10 (other than a periodical payment hereunder in this Rule mentioned), is payable to a person residing within the United Kingdom, whose name and address are stated in an Order under which the money is payable, or in a certificate of a Chief Clerk, or of a Taxing Officer, or of a Master in Lunacy, to be acted upon by the Paymaster, or whose address, in

the case of a payment under an Order in the Chancery Division, is certified to the Paymaster by the solicitor having carriage of the Order, the Paymaster, upon the written request of such person (without attestation), may remit the amount by post to such person at the address so ascertained. The direction for payment will be crossed so as to be payable only through a banker.

(*d*) Any person residing within the United Kingdom, entitled under an Order to any dividend, annuity, or other periodical payment, may send to the Paymaster a request, in the prescribed form, for the remittance of the same by post from time to time as it accrues due, such request to be signed by such person and attested in the manner required in the preceding part of this Rule (*b*), and the Paymaster shall thenceforward, as such periodical payment falls due (and upon receipt of evidence of life or of the fulfilment of any conditions of payment as referred to in Rule 95), remit the same by post to the address stated in the request. The Paymaster's direction will be crossed so as to be payable only through a banker.

(*e*) *No less sum than one shilling to be paid.*—Except in the cases of periodical payments of annuities, or of dividends or interest on funds in Court, no sum of less than one shilling shall be paid by the Paymaster.

Provided that the Paymaster may refuse to make a remittance under this Rule in any case in which he sees reason for so doing, and provided also that the transmission by post upon a request of any crossed direction or other document for obtaining payment shall be at the sole risk of the person at whose request it is sent.

Requests and solicitors' certificates of addresses under this Rule, and notifications of changes of addresses of persons entitled to periodical payments, shall be in such form as may from time to time be prescribed by or with the approval of the Treasury.

49. *Paymaster's directions to be sufficient authority to the Bank or other company.*—The directions of the Paymaster issued under these Rules (signed and countersigned by such officers as may be prescribed or approved by the Treasury under Rule 107) shall be sufficient authority to the Bank for the payment of the money specified in any such directions, and shall be the necessary and sufficient evidence of an Order of the Court to authorise the Bank or other company to transfer, on sale or otherwise, or to deliver, any securities or boxes or other effects standing to the Pay Office Account which may be specified in any such directions.

50. *Discharge to Paymaster.*—A direction or other document by which payment of money is effected, when endorsed or signed by the payee or his lawful attorney, shall be a good discharge to the Paymaster for the amount therein expressed.

51. *Authorities for payments to others than named persons to be witnessed.*—When money is by an Order in the Queen's Bench Division directed to be paid to a person therein named, or, on his authority, to a solicitor or other person, the signature to the authority must be attested by a witness, whose residence and description must be added to his attestation.

52. *Payments to official persons to be made by transfer.*—When money in Court or any sum payable thereout is by an Order directed to be paid to any public officer or department or to the official liquidator of any company, or any other official persons for whom an account is kept at the Bank, payment thereof shall, on a request to that effect, be made by a direction to the Bank to transfer the amount of such payment to the proper account at the Bank accordingly.

When any duty is directed to be paid out of funds in Court such duty shall, without any words in the Order to that effect, be assessed, and, on a request made by or on behalf of the Commissioners of Inland Revenue, be transferred to the proper account at the Bank.

When a person to whom money is payable in his own right under an Order becomes bankrupt, the Paymaster, upon the request of the Official Receiver, or trustee, or other duly authorised person, shall transfer the amount so payable to the proper account at the Bank.

53. *Payments for securities purchased, and transfers of securities sold.*—When money is invested by purchase, the payment for such investment, which (unless otherwise ordered) shall include brokerage, shall be made conditionally upon the transfer or deposit to the Pay Office Account of the securities purchased. And when securities in Court are sold, the transfer or delivery of such securities shall be conditional upon the payment to the Pay Office Account of the proceeds of such sale, after deduction (unless otherwise ordered) of brokerage.

Provided that the Bank shall not be answerable for any default of the Broker of the Supreme Court in respect of such transfer to the Pay Office Account of securities purchased, or of such payment to the Pay Office Account of the proceeds of securities sold.

54. *Accounts to which investments, sales, &c., are to be credited.*—Upon an investment of money in Court or the sale of securities in Court, the securities purchased by such investment or the money realised by such sale respectively shall in every case be placed to the credit to which the money invested or the securities sold previously stood, unless, in the case of an investment, otherwise specially ordered.

55. *Application of dividends accruing on securities transferred.*—When securities in Court are directed to be transferred, delivered out, or carried over, dividends accruing thereon subsequently to the date of the Order directing the transfer, delivery, or carrying over (when the amount of the securities to be transferred, delivered, or carried over is specified in such Order, or if not so specified then subsequently to the time when the amount

of such securities shall be ascertained) shall be paid to the persons to whom or carried over to the credit to which the securities are to be transferred, delivered, or carried over, unless such Order otherwise directs. When securities in Court are directed to be realised, and the whole of the proceeds paid out or carried over in one sum, or in aliquot parts (except when the realisation is to raise a specific sum of money), any dividends accruing on such securities subsequent to the date of the Order directing the realisation (if the amount of such securities is specified in the Order, or if not so specified, then subsequently to the time when such amount shall be ascertained) shall be added to such proceeds, and applied in like manner therewith, unless such Order otherwise directs.

56. *When such dividends have been invested.*—When such dividends as in the last preceding Rule mentioned have pursuant to a general or other previous Order been invested, the securities purchased with such dividends shall, unless otherwise directed, be transferred or delivered, and any dividends accrued in respect thereof be paid, to the persons to whom or carried over to the credit to which such first-mentioned dividends would, if uninvested, have been paid or carried over.

57. *When dividends otherwise applicable have been invested.*—In every case (other than that provided for by the last preceding Rule), when by an Order money or dividends are directed to be dealt with so that the same ought not to be invested, and subsequently to the date of such Order such money or dividends or any part thereof shall have been invested, the securities purchased with such money or dividends shall, unless otherwise directed, be sold, and the proceeds of such sale and any dividends accrued in respect of such securities shall be applied in the same manner as the money or dividends so invested would have been applied under such Order, if they had not been so invested.

58. *Dividends on residue.*—When under any Order dividends on securities in Court are directed to be dealt with, and a subsequent Order is made dealing with part of such securities, the dividends on the residue shall, unless such subsequent Order shall otherwise direct, continue to be dealt with in the same manner as the dividends on such securities were by the prior Order directed to be dealt with.

59. *Application of money or dividends placed on deposit after date of Order dealing therewith.*—When subsequently to the date of an Order dealing with money in Court such money shall have been placed on deposit, as hereinafter provided, or when dividends accruing subsequently to the date of an Order under which such dividends are applicable shall have been placed on deposit, the same when withdrawn from deposit, and any interest credited in respect thereof, shall, unless the Order otherwise directs, be applied in the same manner as such money or dividends would have been applied had the same not been so placed on deposit.

60. *Application of interest on money placed on deposit after date of Order directing its investment.*—When an Order directs money in Court to be invested, and subsequently to the date of such Order the money shall have been placed on deposit, interest accruing in respect of such money shall be applied in the same manner as the dividends arising from such investment are directed to be applied.

61. *Funds ordered to be paid or transferred to women who afterwards marry.*—When funds in Court are by an Order directed to be paid, transferred, or delivered to a woman in her own right who is not married at the date of the Order, or who, being married at that date, shall become a widow, and such woman shall marry before payment, transfer, or delivery of such funds, upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has been made or entered into, before, upon, or since their marriage, or in case any such settlement or agreement for a settlement has been made or entered into, then upon an affidavit of such woman and her husband identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such funds are not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby, such funds shall be paid, transferred, or delivered to such woman without the intervention or concurrence of her husband in the same manner as if she had remained unmarried. When payments not exceeding £50 per annum are by an Order directed so be made to a mother as guardian of her infant children, and such mother marries after the date of the said Order, such payments may be made to her, notwithstanding her marriage, on her separate receipt.

62. *Payments &c. to representatives of deceased persons.*—When funds in Court are by an Order directed to be paid, transferred, or delivered to any person named or described in an Order, or in a certificate of a Chief Clerk, or of a Taxing Officer, or of a Master in Lunacy (except to a person therein expressed to be entitled to such funds as real estate, or to be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right, or for his own use), such funds, or any portion thereof for the time being remaining unpaid or untransferred or undelivered, may, unless the Order otherwise directs, on proof of the death of such person, whether on or after, or in the case of payment directed to be made to creditors as such before the date of such Order, be paid or transferred or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them.

If no administration has been taken out to any such deceased person who has died intestate and whose assets do not exceed the value of £100, including the amount of the funds directed to be so paid, transferred, or delivered to him, such funds may be paid, transferred, or delivered to the person who, being a widower, widow, child, father, mother, brother, or sister of the deceased would

be entitled to take out administration to the estate of the deceased, upon a declaration by such person in the Form No. 15 in the Appendix to these Rules (see p. 258).

63. *Payments &c. to partners.*—When money in Court is by an Order directed to be paid to any persons described in the Order, or in a certificate of a Chief Clerk, or of a Taxing Officer, or of a Master in Lunacy, as co-partners, such money may be paid to any one or more of such co-partners, or to the survivor of them.

64. *Payments &c. to surviving representatives.*—When funds in Court are by an Order directed to be paid, transferred, or delivered to any persons as legal personal representatives, such funds, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof of the death of any of such representatives, whether on or after the date of the Order directing such payment, transfer, or delivery, be paid, transferred, or delivered to the survivors or survivor of them.

65. *Within what time probate or letters of administration must have been granted.*—No funds shall, under Rules 62 and 64, be paid, transferred, or delivered out of Court to the legal personal representatives of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the date of the Order directing such payment, transfer, or delivery, or in case such funds consist of interest or dividends from the date of the last receipt of such interest or dividends under such Order.

66. *Payment of legacy or estate or succession duty.*—The Paymaster, before acting upon an Order for the payment, transfer, or delivery of funds in respect of which legacy or estate or succession duty is (under Rule 20) stated to be payable, shall require the production of the official receipt for such duty, or a certificate from the proper officer of the payment thereof, or that no such duty is payable; and the Paymaster, on receiving notice from the proper officer in any case that such duty is payable, shall cause a memorandum to that effect to be made in his books.

67. *Carrying over fees on proceedings and taxation, and unpaid sums of less than one shilling.*—When costs are by an Order directed to be paid out of funds in Court, the Taxing Officer shall certify the names and addresses of the persons respectively to whom such costs are payable, and the amount of any fees which have not been paid but are payable, and are proper to be paid out of such funds, in respect of any proceedings in the cause or matter, whether the amount shall or shall not have been previously ascertained, and in respect of the taxation of such costs. The Paymaster shall carry over the amount so certified to be payable from the account to which such funds are placed to an account in the Pay Office books for fees on proceedings and taxation; and the amount so carried over shall from time to time, as the Treasury may direct, be paid to the account of Her Majesty's Exchequer.

Sums of less than one shilling held by the Paymaster under Rule 48 (*e*) shall be placed to a special account in the Pay Office books.

68. *Deduction of income tax on payments of annuities or maintenance.*—In acting on Orders directing any annuities or maintenance to be paid out of dividends to accrue on securities in Court (other than securities specifically carried over to provide for such annuities or maintenance), the Paymaster shall draw only for so much of the sums directed by such Orders respectively to be paid as shall remain after making a deduction therefrom for income tax at the rate payable when such annuities or other payments became due, unless such sums shall be directed to be paid without making any such deduction.

VII. Investments.

69. *Investment of accruing dividends under an Order.*—When an Order directs the investment and accumulation of dividends accruing on securities in Court, or to be transferred into Court, or directed to be purchased with money in Court, or to be lodged in Court, the Paymaster upon receipt of the copy of such Order shall, without any request, from time to time (until he shall receive a request or copy of an Order to the contrary), invest such dividends, if amounting to or exceeding £40 half yearly, together with all accumulations of dividends thereon, as soon as conveniently may be after they shall accrue due and have been received, in the particular description of securities named in the Order directing such investment and accumulation.

70. *Purchase of Exchequer bills or bonds.*—When money in Court is invested in Exchequer bills or Exchequer bonds, and when Exchequer bills or Exchequer bonds are, in pursuance of an Order, lodged in Court, any principal money or interest which may thereafter be received and paid into the Bank in respect of such bills or bonds, or in respect of any such bills or bonds for which the same may be exchanged, shall from time to time, as the same shall be so received and paid into the Bank, be also invested by the Paymaster, unless such Order otherwise directs, or until he receives a written request or notice of a further Order to the contrary, in Exchequer bills or Exchequer bonds, which shall be placed to the same credit.

71. *Bank to renew Exchequer bills, and to receive principal and interest of securities when paid off.*—When and so often as any Exchequer bills or other securities deposited at the Bank to the credit of the Pay Office Account shall be in course of payment, the Bank shall, without any direction from the Paymaster, cause all such bills or other securities so in course of payment to be delivered to one of the cashiers of the Bank, who is to receive the principal money or interest due thereon, or in the case of Exchequer bills to exchange the same for new bills if new bills are issued, or otherwise to receive the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pay such interest, or principal and interest (as the case may be), into and deposit all such new bills in the Bank to the Pay Office Account; and the Bank shall forthwith after every such exchange or receipt of principal or interest certify to the Paymaster, without any direction from him for that purpose, the numbers, dates, and amounts of the Exchequer bills or other

securities so exchanged or paid off, and also the numbers, dates, and amounts of the new bills taken in exchange, and the amount of the interest, or principal money and interest (as the case may be), received on each bill or set of bills or other securities; and upon receiving such certificate the Paymaster shall place such new bills and such principal money and interest to the credit in the books at the Pay Office to which the bills or other securities so exchanged or paid off were placed.

72. *Limit of amount to be invested.*—A sum of money in Court less than £40 shall not be invested in securities, except in the cases provided for by the Rule next following, and unless an Order directs such investment notwithstanding the smallness of the amount; but such sum if not less than £20 shall be placed on deposit until, with the interest accrued thereon, it shall amount to £40, and shall then be invested as directed. This Rule shall extend to the investment of dividends accruing on securities in Court which are directed to be invested.

73. *Investment of money lodged under The Trustee Act,* 1893.—A sum of money lodged in Court without an affidavit, as provided in Rule 41, if or so soon as such money and the interest, if any to be credited in respect thereof, shall amount to or exceed £40, and the dividends accruing on any securities so lodged, if and when they shall amount to or exceed £20, shall be invested without any Order or request in New Consols, and the dividends accruing on such New Consols and all accumulations thereof shall, if or so soon as they amount to £20, be invested in New Consols.

When it is stated in the Schedule to the affidavit made pursuant to Rule 41 that it is desired that any money to be lodged in Court, and the accumulations thereof or any dividends to accrue on any securities to be so lodged, should be invested in any description of Government securities, such moneys, if or so soon as such money and the interest, if any, to be credited in respect thereof shall amount to or exceed £40, and the dividends accruing on such securities, if or so soon as they shall amount to or exceed £20, shall be invested accordingly, without any Order or further request for that purpose.

Dividends accruing on funds or on investments or accumulations of funds lodged in Court, under the 32nd Section of the Act 36 Geo. III. c. 52, or under the Act 10 & 11 Vict. c. 96, prior to the commencement of the Chancery Funds Rules, 1872, shall, when or so soon as they amount to or exceed £20, be invested without any request.

74. *Lodgments under* 36 *Geo. III. c.* 52, *s.* 32, *and* 10 *&* 11 *Vict. c.* 96, *prior to* 1*st January,* 1894, *to be dealt with as if lodged under Trustee Act,* 1893.—Money or securities lodged in Court under the 32nd Section of the Act 36 Geo. III. c. 52, or under 10 & 11 Vict. c. 96, prior to the 1st January, 1894, and securities purchased with such money, or the income thereof, shall, subject to any Order affecting the same made prior to the 1st January, 1894, be dealt with in the same manner as if such money or securities had been lodged in Court under the 42nd Section of The Trustee Act, 1893.

75. *Investing stayed or discontinued on request.*—In all cases, upon a request signed by a solicitor acting on behalf of any person claiming to be entitled to or interested in securities in Court that the dividends or interest accruing on any specified securities may not be invested being at any time left at the Pay Office, the Paymaster shall be at liberty to cease to invest any more dividends or interest accruing on such securities, or to place the same on deposit, until he has received a copy of a Schedule in that behalf.

VIII. Money on Deposit, and Interest thereon.

76. *Money to be placed on deposit.*—Subject to the two Rules next following all money to be lodged in Court in the Chancery Division, including dividends received in respect of securities in Court, and not otherwise directed to be dealt with, shall be placed on deposit without a request. But money arising by the sale, conversion, or payment off of securities in Court in that Division shall only be placed on deposit upon a request to that effect.

77. *Money not to be placed on deposit in certain cases.*—Money shall not be placed on deposit in the following cases:—

(*a*) In any cause or matter in the Queen's Bench or Probate, Divorce and Admiralty Division.

(*b*) When lodged in the Chancery Division under the provisions of Order XXII. or of Rule 26 of Order XXXI. of the Rules of the Supreme Court, 1883.

(*c*) When lodged under the standing orders of either House of Parliament, pursuant to the Act 9 & 10 Vict. c. 20 or any Act amending the same, in respect of works or undertakings to be executed under the authority of Parliament, or when lodged under any Rule or Provisional Order made by the Board of Trade.

(*d*) If lodged prior to the commencement of The Court of Chancery Funds Act, 1872, pursuant to the Copyhold Acts, or to Section 69 of The Lands Clauses Consolidation Act, 1845.

(*e*) When the amount is less than £20.

(*f*) When a Payment Schedule dealing with the money otherwise than by directing it to be placed on deposit or carried over has been left at the Pay Office.

(*g*) When a request that the money shall not be placed on deposit, signed by a solicitor acting on behalf of a person claiming to be entitled to or interested in the money, is left at the Pay Office: Provided that the person making such request may at any time withdraw the same, and request that the money may be placed on deposit.

78. *When money shall be withdrawn from deposit.*—Money shall be withdrawn from deposit in the following cases:—

(*a*) When and to such an amount as the money is by an Order directed to be dealt with, otherwise than by carrying over.

(*b*) When the amount is reduced below £20.

(*c*) Upon a request signed by a solicitor acting on behalf of a person interested, and countersigned by a Registrar or Chief Clerk, containing a notification that the money is about to be dealt with by an Order.

79. *Time for placing money on deposit.*—The placing on deposit of money lodged in Court shall not be deferred beyond the last day of the month in which it shall be lodged in Court, and in the case of money lodged in Court on the last day of a month, the placing on deposit shall not be deferred beyond the last day of the following month; and when a request to place money in Court on deposit shall be sent to or left at the Pay Office, the money shall be so placed on the day next following that on which such request shall be so left or received at the Pay Office.

80. *As to placing on deposit cash arising from conversion of Government securities.*—When an Order directs Government securities to be sold and the whole of the money arising thereby to be placed on deposit, and when such securities are realised by exchange as hereinafter provided, such money shall be deemed to have been placed on deposit (without a request for that purpose) on the day on which such exchange shall be effected.

81. *No interest computed on a fraction of* £1.—Interest upon money on deposit shall not be computed on a fraction of £1.

82. *For what periods interest is to be computed.*—Interest upon money on deposit shall accrue by calendar months, and shall not be computed for any less period than one month. Such interest shall begin on the first day of the calendar month next succeeding that in which the money is placed on deposit, and shall cease from the last day of the calendar month next preceding the day of the withdrawal of the money from deposit.

83. *When interest is to be credited.*—Interest which has accrued for or during the half-years ending respectively the 31st of March and the 30th of September in every year on money then on deposit shall, on or before the fifteenth days of the months respectively following, be placed by the Paymaster to the credit to which such money shall be standing on every such half-yearly day. And when money on deposit is withdrawn from deposit, the interest thereon which has accrued and has not been credited shall be placed to the credit to which the money is then standing.

84. *Mode of calculating interest in certain cases on parts of money withdrawn.*—When money on deposit consists of sums which have been placed on deposit at different times, and an Order is made dealing with the money, and part of

such money has to be withdrawn from deposit for the purpose of executing such Order, the part or parts of the money dealt with by such Order last placed and remaining on deposit at the time of such withdrawal shall, for the purpose of computing interest, be treated as so withdrawn, unless the Order otherwise directs.

85. *Placing of interest on deposit.*—Unless otherwise directed by an Order, interest credited on money on deposit shall, when or so soon as it amounts to or exceeds £20, be placed on deposit, and for the purpose of computing interest upon it shall be treated as having been placed on deposit on the last half-yearly day on which any such interest became due.

IX. Exchange or Conversion of Government Securities and Transactions with the National Debt Commissioners.

86. *Exchanges of securities in lieu of actual purchases and sales.*—When Government securities in Court are directed to be sold such securities may be realised by exchange in the Pay Office books in the manner hereinafter provided, and when money in Court is required to be invested in Government securities, such investment may be made by exchange in like manner.

87. *Manner of recording such exchanges.*—For the purpose of effecting any such exchange, an account of each description of Government securities shall be kept at the Pay Office, entitled "Exchange Accounts," and such accounts shall contain on the one side thereof the amount of securities received in exchange for money, and the amount of money received in exchange for securities, and on the other side thereof the amount of money and securities given in exchange for such securities and moneys respectively. The money value of the securities received or given in exchange under this Rule shall be determined by the price of the day next following that on which the Paymaster is required or authorised to make the sale or investment; or if the money invested consist of dividends accrued on securities in Court, and previously to the accruing thereof required or authorised to be invested in Government securities, the price of the day next following that on which such dividends shall be placed by the Bank to the Pay Office Account, or if no price can be ascertained for such day, then the price of the next following day for which it can be ascertained. The price herein mentioned shall be the Bank average price of the Government securities appearing in the account transmitted to the Controller General of the National Debt Office by the Cashiers of the Bank, a copy whereof shall be sent daily by the Bank to the Pay Office.

88. *Commission to be charged on exchanges and paid to the Exchequer.*—Upon every such exchange a commission shall be charged of one-eighth per cent. on the amount of money realised or invested, in lieu of any brokerage provided for by the Order or usually charged upon the sale or purchase of such securities; but no such charge for commission shall in any case be less than sixpence; and unless the payment thereof is otherwise provided for by

the Order, such commission shall be deducted from the proceeds of the realisation or the amount to be invested respectively, or in case a specific amount of money is to be realised, the commission upon it shall also be realised by the exchange of an additional amount of the securities by which the realisation is to be effected; and when the payment of brokerage is otherwise provided for, the Paymaster shall not be required to give effect to any such exchange until such commission has been paid into the Bank to the Pay Office Account. Such commission when so paid in or realised and deducted as aforesaid shall be placed to an account in the Pay Office books for commission on exchanges, and the amount so placed shall from time to time, as the Treasury may direct, be transferred to the account of Her Majesty's Exchequer.

89. *Periodical adjustment of exchange account.*—The Paymaster shall from time to time, but not less than once in every year, prepare and transmit to the National Debt Commissioners a statement of the result of the exchange operations under these Rules, showing the total amounts of each description of Government securities purchased by exchange and realised by exchange respectively; and the total amounts of the cash charged and credited respectively in the Pay Office books as the money value of the securities exchanged. And the difference so arising between the amount of any description of Government securities standing to the credit of the Pay Office Account at the Bank and the amount of such securities appearing by the books of the Pay Office to be in Court, and also the difference between the money value nominally paid and nominally received for such securities, shall be forthwith adjusted as follows:—

(*a*) If such statement shows that the total amount of any description of Government securities purchased by exchange is in excess of the total amount of the same description of securities realised by exchange, the amount of such excess of securities purchased by exchange shall be transferred by the National Debt Commissioners from their account at the Bank on behalf of the Supreme Court to the Pay Office Account at the Bank. And such transfer of securities shall be treated as a repayment by the said Commissioners, out of the money placed in their hands by the Paymaster on behalf of the Supreme Court, of the difference between the cash charged and credited respectively in the Pay Office books in respect of such exchanges, as shown in the said statement.

(*b*) If such statement shows that the total amount of any description of Government securities purchased by exchange is less than the total amount of the same description of securities realised by exchange, the amount of the excess of the securities realised by exchange shall be transferred by the Paymaster to the account at the Bank of the National Debt Commissioners on behalf of the Supreme Court. The money value of the securities so transferred

(being the difference between the cash charged and credited respectively in the Pay Office books in respect of such exchanges, as shown in the said statement) shall be placed by the National Debt Commissioners to the credit of the account kept by them of money placed in their hands by the Paymaster on behalf of the Supreme Court.

90. *Adjustment of dividends on Government securities in Court.*—The Paymaster shall from time to time prepare and transmit to the National Debt Commissioners a statement showing the amount of the dividends, less income tax, which became payable in the period to which such statement relates, on the Government securities in Court (at the closing of the Bank books for such dividends) as shown by the Pay Office books, and the amount of the dividends received in the same period on the Government securities standing to the credit of the Pay Office Account at the Bank; and the difference appearing thereby shall be adjusted as follows:—

(*a*) If the amount of dividends payable shall have exceeded the amount of dividends received, the amount of the difference shall be credited by the National Debt Commissioners to the account kept by them of money placed in their hands by the Paymaster on behalf of the Supreme Court.

(*b*) If the amount of dividends received shall have exceeded the amount of dividends payable, the amount of the difference shall be transferred by the Paymaster to the account at the Bank of the National Debt Commissioners on behalf of the Supreme Court.

91. *Surplus of money on the Pay Office Account to be transferred to the National Debt Commissioners.*—When the money to the credit of the Pay Office Account is, in the opinion of the Paymaster, in excess of the amount required for the purpose of making current payments, he shall transfer the amount of such excess from the Pay Office Account to the account at the Bank of the National Debt Commissioners on behalf of the Supreme Court, and shall notify such transfer to the said Commissioners.

92. *Deficiency of money on the Pay Office Account to be made good by National Debt Commissioners.*—When the money to the credit of the Pay Office Account is, in the opinion of the Paymaster, insufficient for the purpose of making current payments, the National Debt Commissioners, upon a request in writing of the Paymaster, shall forthwith transfer from their account at the Bank on behalf of the Supreme Court to the Pay Office Account the amount of money specified in such request.

93. *National Debt Commissioners to give credit for interest on money on deposit.*—The Paymaster shall, after the 31st March and 30th September in every year, certify to the National Debt Commissioners the amount of interest on money on deposit which has accrued for or during the half years respectively ending on those days; and the National Debt Commissioners, as soon thereafter

as may be, shall place such amount to the credit of the account kept by them of money placed in their hands by the Paymaster on behalf of the Supreme Court, and shall cause the amount of income tax (if any) chargeable on such interest to be paid to the account at the Bank of the Commissioners of Inland Revenue.

X.—Calculation of Residues, Evidence of Life, &c.

94. *Calculations of residues to be made in Pay Office.*—For the purpose of ascertaining the amounts of any residue or aliquot part of money or securities dealt with by an Order, when such amounts cannot be stated in the Payment Schedule and are not directed to be certified, the necessary calculations shall be made in the Pay Office: Provided that the Paymaster may require such calculations to be first stated in a certificate signed by the solicitor of the party interested.

95. *Evidence of life &c.*—When any person is entitled, under an Order, to receive dividends or other periodical payments from the Pay Office, and the Paymaster requires evidence of life or of the fulfilment of any conditions affecting such payments, such evidence may be furnished by a declaration signed by a solicitor acting on behalf of such person or by a declaration signed by the person entitled to the payment, and attested by a justice of the peace, commissioner to administer oaths, clerk in holy orders, or notary public; and the Paymaster shall act on such evidence unless in any case he thinks fit to require such evidence to be by statutory declaration or affidavit. The Paymaster may prescribe, with the approval of the Treasury, the terms in which such declarations or affidavit shall be made, and the forms to be used for that purpose. The provisions of this rule shall apply to Orders made before these Rules come into operation, notwithstanding anything as to evidence in such Orders contained.

96. *Affidavits in other cases.*—When in carrying into effect the directions of an Order evidence is required by the Paymaster for any purposes other than those included in the immediately preceding Rules, he may receive and act upon an affidavit, or upon a statutory declaration, and every such affidavit or statutory declaration shall be filed in the Central Office when the Paymaster shall consider it necessary.

XI.—Copies of Orders and other Documents for Audit Office.

97. *Office copy of Schedules &c. to be sent to Audit Office.*—An office copy of the Schedules to every Order in the Chancery Division and in Lunacy, and, when requested, an office copy of any Order in the Queen's Bench and Probate, Divorce, and Admiralty Divisions, to be acted upon by the Paymaster, shall be transmitted by the proper officer to the Audit Office; and in case of any amendments being made in any such Schedule or Order, such office copy shall be likewise amended.

98. *Office copy of certificates and other documents to be sent.*—An office copy of every certificate or other authority of a Master of the Supreme Court, Chief Clerk, or Taxing Officer, or of a Master in Lunacy, which is to be acted upon by the Paymaster, or so much thereof as may be necessary, and an office copy of any certificate, affidavit, or statutory declaration which may be received in evidence by the Paymaster, shall, when requested, be transmitted by the proper officer to the Audit Office.

XII.—MISCELLANEOUS.

99. *Paymaster to give certificates of funds in Court.*—The Paymaster, upon a request signed by or on behalf of a person claiming to be interested in any funds in Court standing to the credit of an account specified in such request, may, in his discretion, issue a certificate of the amount and description of such funds, and such certificate shall have reference to the morning of the day of the date thereof, and shall not include the transactions of that day, and the Paymaster shall notify on such certificate the dates of any Orders restraining the transfer, sale, delivery out, or payment, or other dealing with the funds in Court to the credit of the account mentioned in such certificate, and whether such Orders affect principal or interest, and any charging Orders affecting such funds, of which respectively he has received notice, and the names of the persons to whom notice is to be given, or in whose favour such restraining or charging Orders have been made. The Paymaster may re-date any such certificate, provided that no alteration in the amount or description of the funds has been made since the certificate was issued. And when a cause or matter has been inserted in the list referred to in Rule 101, the fact shall be notified on the certificate relating thereto.

100. *Paymaster may issue transcripts of accounts and furnish other information.*—Upon a request signed by or on behalf of a person claiming to be interested in funds in Court, the Paymaster may, in his discretion, issue a transcript of the account in his books specified in such request; and if so required by the person to whom it is issued, such transcript shall be authenticated at the Audit Office. He may also upon a like request supply such other information or issue such certificates with respect to any transactions or dealings with funds in Court as may from time to time be required in any particular case.

101. *List of dormant funds &c. to be made triennially and published.*—On or before the 1st day of March in every third year the Paymaster shall prepare, in such form and with such particulars as the Treasury may from time to time direct, a list or statement of the accounts in the books of the Pay Office (other than those referred to in the next following Rule) to the credit of which there stood on the 1st day of September then next preceding any funds not less than £50, which have not been dealt with, otherwise than by the continuous investment or placing on deposit of dividends, during the fifteen years immediately preceding the last-mentioned date.

The said list or statement shall be filed in the Central Office, and a copy thereof shall be inserted in the "London Gazette" and exhibited in the several offices of the Court.

The Paymaster may, in his discretion, give any information respecting any funds in Court mentioned in such list or statement upon a request signed by the person applying for such information or by his solicitor. If such request be made by a solicitor, such information shall not be given unless the request states the name and address of the person on whose behalf it is made, and that such person is in the opinion of the applicant beneficially interested in such funds. If such request be made by any person other than a solicitor, such information shall not be given unless the applicant is able to satisfy the Paymaster that the request is such as may in the particular case be properly complied with.

102. *Transfer of small balances to a special account.*—The Paymaster may from time to time carry over to a special account for small balances such balances of money and securities as do not together amount to £5, and on which the money or securities shall not have been dealt with during the preceding five years. When an Order dealing with the funds carried over under this Rule is to be acted upon, the Paymaster shall carry back such funds and any dividends accrued thereon to the account from which they were so carried over, and shall deal therewith as directed by such Order.

103. *Titles of accounts not to exceed thirty-six words.*—The length of the title of any ledger credit shall not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is opened: Provided that such title may be extended beyond thirty-six words if a sufficient reason be assigned to the satisfaction of the Registrar or Master of the Supreme Court, and the Registrar or Master shall in such case add to the instruction to open such credit the words "notwithstanding Rule 103"; and provided also that the Paymaster may extend any such title if in his opinion a sufficient reason be assigned for so doing. In such title four figures shall be reckoned as one word.

104. *Outstanding cheques of late Accountant-General.*—Unpaid cheques signed by the late Accountant-General, or any of his predecessors, shall be a sufficient authority to the Paymaster for making the payments therein purporting to be intended to be made.

105. *Index of documents filed.*—An index shall be made and kept in the Central Office of all documents by these Rules directed to be filed there.

106. *Names and addresses of suitors.*—Upon the request of any person, or of a solicitor acting on behalf of any person, named in an Order and entitled to or interested in funds in Court, the Paymaster shall record, in such manner as he shall consider convenient for reference, the name and address of such person, or of the solicitor for the time being acting on his behalf, and also any change of such address which may be notified to him.

107. *Paymaster's directions to be issued and signed as Treasury may prescribe.*—The directions of the Paymaster for giving effect to these Rules shall be prepared and issued in such form and manner as the Treasury may from time to time direct, and shall be signed by such officers as the Treasury may prescribe or approve.

108. *Identification of persons to be paid &c.*—It shall be the duty of the Paymaster to comply with any instructions which may be given to him by the Treasury as to the means of identifying any person to whom a direction for payment of money or for delivery of securities out of Court is issued, when such identification may be deemed necessary.

109. *When stocks or shares of companies or other securities are converted.*—Whenever any amount or number of stock, shares, or other security in Court (in this Rule referred to as the original security) is converted into any other stock, shares, or other security (in this Rule referred to as the substituted security), so that the description thereof will differ from the description given of the original security in the Order or other authority under which the Paymaster acts respecting the same, the Paymaster shall write off from the account to which the same may be standing the original security so converted, and shall place to the same account a proportionate part of the substituted security; and except in so far as any original security may be affected by any Order brought to the Pay Office in due time for that purpose, the Paymaster shall, as far as may be practicable, give effect to every part of any Order or other authority under which he has been acting which shall refer to any such original security so converted as aforesaid, or the dividends thereon. Provided that payments of income shall not be made in pursuance hereof, without an Order, in any case where the substituted security is a terminable annuity, unless such terminable annuity is based upon a deduction for sinking fund intended to replace the capital of the original security.

110. *When allotments of new stock are made by companies.*—Whenever any allotment letters, scrip allotments, or other securities are allotted or assigned in respect of any sums of stock, or of any shares or other security in Court, such allotment letters, scrip allotments, or other securities (excepting such of them, if any, as may be affected by any Order of which the Paymaster has notice) shall be sold. The money to arise by the said sale shall be paid (without deduction for brokerage) by the broker to the Pay Office Account at the Bank, and placed in the books of the Pay Office to the respective accounts to which the said stock or shares or other security are standing, in respect of which such allotment letters, scrip allotments, or other securities have been allotted or assigned.

111. *Rules to apply to District Registries at Liverpool and Manchester.*—These Rules shall apply to funds in Court or hereafter lodged in Court in the District Registries in Liverpool and Manchester; but shall not apply in other District Registries.

(Signed) HERSCHELL, *C.*

4th December, 1894.

We certify that these Rules are made with the concurrence of the Commissioners of Her Majesty's Treasury.

(Signed) RICHD. K. CAUSTON.
W. A. MCARTHUR.

APPENDIX.

Form No. 1.

Lodgment Schedule, referred to in Rule 5.

LODGMENT SCHEDULE.

In the High Court of Justice.—Chancery Division.

Date of Order 18

Title of Cause or Matter 18 . *A.* No.

Ledger Credit. [If same as title of cause, state "As above."]

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.

Specimen Lodgment Schedules.

In the High Court of Justice.—Chancery Division. 21st July, 18 .
Re Morton deceased, Morton *v.* Matthews. 1881. M. 391.
Ledger Credit. As above.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
Balance to be certified on passing final account as Receiver.	Edmund James White (the Receiver).						
Balance to be certified of the £87 5s. 9d. due from him as Executor after retaining his costs.	James Matthews (Defendant).						

In the High Court of Justice.—Chancery Division. 15th June, 18 .

A. *v.* B. 1883. A. 16.

Ledger Credit. As above.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
New Consols - - -	J. A. and J. B. -	...	..,	...	15,000	0	0
Great Western Railway 4 p.c. Debenture Stock.	Do. -	...	...	...	1,500	0	0
Balance of Cash to be certified.	J. B.						
Invest and accumulate in New Consols.							

Specimen Lodgment Schedule of Purchase Money to be signed by a Chief Clerk.

In the High Court of Justice.—Chancery Division.

A. *v.* B. 1885. A. 16.

Ledger Credit. The said action. Proceeds of sale of real estate.

LODGMENT SCHEDULE.

Purchase money to be lodged pursuant to Order dated 31st July, 18 .

Particulars of Money to be lodged.	Person to make the Lodgment.	Amount.		
		£	s.	d.
Deposit - - - - - -	T. A. the Auctioneer -	20	0	0
Balance of purchase money and interest.	W. K. the Purchaser -	195	0	0
Invest and accumulate amounts lodged in New Consols.				
The above funds not to be paid out, transferred, or dealt with, without notice to the said W.K.				
		215	0	0

Total amount in words, } Two Hundred and Fifteen Pounds.

Dated this 10th day of August, 18 .

Chief Clerk.

Form No. 2.

Payment Schedule, referred to in Rule 6.

PAYMENT SCHEDULE.

In the High Court of Justice.—Chancery Division.

Date of Order 18 .

Title of Cause or Matter 18 . *A.* No.

Ledger Credit. [If same as title of cause, state "As above."]

Funds in Court.

Particulars of payments, transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.

Specimen Payment Schedules.

In the High Court of Justice.—Chancery Division. 2nd August, 18 .

B. *v.* D. 1883. B. 165.

Ledger Credit. As above.

Funds in Court { £730 7s. 7d. New Consols. / £10 13s. 2d. Cash.

Particulars of payments, transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
Pay - - - - -	John Park - - - -	5	6	7			
Sell New Consols - -	- - - - - -	...	...	...	730	7	7
Out of proceeds and balance of funds pay:—							
Costs of Petitioners to be taxed.							
Legacy duty in respect of fund in Court.							
Divide residue in fourths, and pay as under:—							
One-fourth - -	John Smith (Petitioner)						
One-fourth - -	Emma Joy (Petitioner), Wife of Wm. Joy, on her separate receipt.						
Out of one-fourth - Residue of such one-fourth.	Eliza Joy (Widow) - Edward Sparkes.	79	10	6			
Carry over one-fourth. Invest and accumulate in New Consols.	Separate account of William Peters (Plaintiff).						

In the High Court of Justice.—Chancery Division. 4th September, 18 .

Smith *v.* Williams. 1871. S. 103.

Ledger Credit. The said cause. Trust legacy of £800 for Charles Pearce and Susan his wife and their children and incumbrancers.

Funds in Court { £812 11s. New Consols. £50 Money on deposit. £48 1s. 3d. Cash.

Particulars of payments, transfers, or other operations ordered.	Payees and Transferees, or separate Accounts.	Amounts.					
		Money.			Securities.		
		£	s.	d.	£	s.	d.
Sell New Consols - -	- - - - - -	...	...	...	812	11	0
Pay - - - - -	David Shore - - / Charles Weaver - -	45	6	2			
Pay taxed costs of George Turner.							
Pay residue of funds as under:—							
One-fifth - -	George Turner.						
Out of one-fifth -	James Watson - -	100	0	0			
Residue of last-named one-fifth -	Birmingham Banking Company, mortgagees.						
Out of one-fifth -	Henry Earle (as mortgagee).	140	8	4			
Out of same one-fifth, interest on £100 at £5 per cent. per annum from 18 to day for payment.	The same.						
Residue of last-named one-fifth.	Robert Wild and Joseph Hunter, trustees of Arthur Turner.						
One-fifth - -	Matthew Field.						
One-fifth - -	William Long.						

Form No. 3.

Combined Lodgment and Payment Schedule, referred to in Rule 8.

LODGMENT AND PAYMENT SCHEDULE.

In the High Court of Justice.—Chancery Division. Date of Order, 18 .
Title of Cause or Matter 18 . *A.* No.
Ledger Credit. [If same as title of cause, state "As above."]

I. LODGMENT.

Particulars of Funds to be lodged.	Person to make the Lodgment.	Amounts.	
		Money.	Securities.

II. PAYMENT.

Funds to be dealt with { £ Consolidated Three per Cent. Annuities. / £ Cash. / Funds to be lodged as above.

Particulars of payments, transfers, or other operations ordered.	Payees, Transferees, or separate Accounts.	Amounts.	
		Money.	Securities.

Form No. 4.

Certificate of Ascertained Sums, referred to in Rule 11.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

Title or Cause or Matter .
Ledger Credit. [If same as title of cause, state "As above."]

I certify that under an Order dated , 18 , the sums stated in the Schedule subjoined hereto, amounting in the whole to have been ascertained to be the sums payable under the said Order to the persons respectively named, in respect of [*state in what character paid*].

Dated this day of 18 .

{ Chief Clerk [*or* Taxing Officer].

SCHEDULE.

Name.	Address (if ascertained).	Amount to be paid.

Form No. 5.

Certificate of Taxed Costs referred to in Rule 12.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

Title of Cause or Matter .

Ledger Credit. [If same as title of cause, state "As above."]

In pursuance of an Order dated 18 I have been attended by the solicitors for
and I certify that I have taxed the costs specified in the Schedule subjoined hereto, directed to be taxed by the said Order, at the sums respectively stated in the Schedule, which sums, with the fees of taxation specified (if any), amount to the total sum of

Dated this day of 18 .

Taxing Officer.

SCHEDULE.

Costs.	Payable to		Amount of Taxed Costs and Fees.		
	Name.	Address.			
		Total ... £			

Form No. 6.

Certificate of Execution of Documents, referred to in Rule 18.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

Title of Cause or Matter .

Ledger Credit. [If same as title of cause, state "As above."]

An Order of the Court, dated , 18 , having directed that the undermentioned dealings with the funds specified shall be contingent upon the execution of [*here describe the document to be executed*], I hereby certify (pursuant to Rule 18 of the Supreme Court Funds Rules) that the said document has been executed as directed in the said Order.

Whether payment, transfer, or other operation, and description of securities (if any).	Name of Payee, Transferee, or separate Account.	Amounts to be dealt with.	
		Money.	Securities.
	Totals ... £		

Amount in words [*Total only of each money column*]. } Money / Securities

Dated this day of 18 .

Chief Clerk [*or* Master in Lunacy].

Form No. 7.

Order for Payment in Queen's Bench and Probate, Divorce, and Admiralty Divisions, referred to in Rule 28.

HIGH COURT OF JUSTICE,— DIVISION.

Title of Cause or Matter *v.* 18 . *A.* No.

Ledger Credit. [Name of ship in Admiralty actions.]

Date 18 .

The Paymaster-General is hereby directed to make the payments specified below out of the money standing in his books to the credit of the above cause or matter.

Name of the person to whom, and also of the person (if any) upon whose authority, payment is to be made.		Particulars.	Amount to be paid.
Person to be paid (*Christian name to precede surname*).	Person (if any) to give authority for payment.		

Total amount in words.

(*Signature*)

Form No. 8.

Request for Lodgment of Money in Chancery Division, referred to in Rule 30.

HIGH COURT OF JUSTICE—CHANCERY DIVISION.

I.—*Request for Direction for Lodgment.*

Title of Cause or Matter *v.* 18 . *A.* No.

Ledger Credit to which lodged [If same as title of cause, state "As above."]

Further particulars (if any) required to be stated .

The Paymaster is hereby requested to issue a direction to the Bank to receive from the sum of for the ledger credit in the books of the Pay Office above specified.

(*Signature*)

II.—*Paymaster's Direction for Lodgment.*

To the Agent of the Bank of England (Law Courts Branch).

Please receive the above-stated sum, and place it to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature.

(*Signature*)

(*Date*) 18 .

III.—*Bank Certificate of Receipt.*

To the Assistant Paymaster-General.

Bank of England, 18 .

The above-stated sum has been this day received.

(*Signature*)

Form No. 9.

Request for Lodgment or Transfer of Securities in Chancery Division, referred to in Rule 30.

HIGH COURT OF JUSTICE.—CHANCERY DIVISION.

I.—*Request for Direction for Lodgment or Transfer of Securities.*

Title of Cause or Matter *v.* . 18 . *A.* No.

Ledger Credit to which lodged } [If same as title of cause, state "As above."]

Authority is hereby requested for the lodgment or transfer to the account of the Paymaster-General for and on behalf of the Supreme Court of Judicature of the securities mentioned below, for the ledger credit in the books of the Pay Office above specified.

To be lodged or transferred by .

Description and amount of securities .

Date of Order (if any) 18 .

(*Signature*)

II.—*Paymaster's Direction for Lodgment or Transfer.*

Authority is hereby given for the lodgment or transfer of the above-mentioned securities to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature.

(*Signature*)

(*Date*) 18 .

III.—*Certificate of Lodgment or Transfer.*

Address . Date 18 .

It is hereby certified that in accordance with the above authority the securities herein mentioned have this day been lodged or transferred to the account of the Paymaster-General.

(*Signature*)

N.B.—Under the Supreme Court Funds Rules made in pursuance of Acts of Parliament, the Bank or other Company in whose books the transfer herein authorised is made is required to certify such transfer hereon, and to return this document to the Assistant Paymaster-General, Royal Courts of Justice, London.

Form No. 10.

Request for Lodgment in Chancery Division under Orders XXII. and XXXI., referred to in Rule 30.

HIGH COURT OF JUSTICE—CHANCERY DIVISION.

I.—*Request for Lodgment of Money under Order XXII. or Rule* 26 *of Order XXXI.*

Title of Cause or Matter *v.* . 18 . *A.* No.

Ledger Credit to which lodged } [If same as title of cause, state "As above."]

The Paymaster is requested to issue a direction to the Bank to receive £ , which amount is paid in*

(*Signature*)

II.—*Paymaster's Direction for Lodgment.*

To the Agent of the Bank of England (Law Courts Branch).

Please receive the above-stated sum and place it to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature.

(*Signature*)

(*Date*) 18 .

III.—*Bank Certificate of Receipt.*

To the Assistant Paymaster-General.

Bank of England, 18 .

The above-stated sum has been this day received.

(*Signature*)

* Insert one of the following statements, in accordance with the circumstances:—

(A) "on behalf of defendant [*state name*] in satisfaction of claim of above-named [*state name of party*]" (*or* "with defence setting up tender").

(B) "on behalf of defendant [*state name*] against claim of above-named [*state name of party*] with defence denying liability."

(C) "to security for costs account on behalf of [*state name of party, and whether plaintiff or defendant*]."

Form No. 11.

Request for Lodgment in Queen's Bench Division, referred to in Rule 32.

HIGH COURT OF JUSTICE—QUEEN'S BENCH DIVISION.

I.—*Request for Lodgment of Money.*

Title of Cause or Matter *v.* 18 . *A.* No.

To the Agent of the Bank of England (Law Courts Branch).

Please receive £ for the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature, which amount is paid in*

(*Signature*)

Name of Solicitor on the other side

Solicitor for the

Date 18 .

II.—*Bank Certificate of Receipt.*

To the Assistant Paymaster-General.

Bank of England, 18 .

The above-stated sum has been this day received.

(*Signature*)

* Insert one of the following statements in accordance with the circumstances :—

(A) "on behalf of defendant [*state name*] in satisfaction of claim of above-named [*state name of party*]" (*or* "with defence setting up tender").

(B) "on behalf of defendant [*state name*] against claim of above-named [*state name of party*] with defence denying liability."

(C) "to security for costs account on behalf of [*state name of party, and whether plaintiff or defendant*]."

(D) If lodged in pursuance of an Order, or otherwise than as above, state nature and date of authority. For instance :—"Under Order dated day of 18 " (*or* "On notice of appeal [in bankruptcy], dated day of 18 ").

Form No. 12.

Request for Lodgment in Probate, Divorce, and Admiralty Division, referred to in Rule 34.

HIGH COURT OF JUSTICE.—PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

I.—*Request for Authority for Lodgment.*

Title of Cause or Matter *v.* 18 . *A.* No.

Ledger Credit. [Name of Ship in Admiralty actions.]

To the Registrar.

I request authority for the lodgment of £ at the Bank of England; such lodgment being for [*state here such particulars as may be required*].

(*Signature*)

II.—*Authority for Lodgment.*

To the Agent of the Bank of England (Law Courts Branch).

Please receive the above-stated sum and place it to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature.

(*Signature*)

(*Date*) 18

III.—*Bank Certificate of Receipt.*

To the Assistant Paymaster-General.

Bank of England 18 .

The above-stated sum has been this day received.

(*Signature*)

Form No. 13.

Notice of Appropriation of Money lodged in Queen's Bench Division under Order XIV., referred to in Rule 43.

High Court of Justice.—Queen's Bench Division.

Notice of Appropriation (under Rule 43 of the Supreme Court Funds Rules) of Money lodged under Order XIV.

Title of Cause or Matter *v.* 18 . *A.* No.

To the Assistant Paymaster-General.

Date 18 .

Take notice that £ of the money lodged in Court in the above action under Order dated 18 is appropriated by the defendant [*state name of party*] in respect of the Plaintiff's claim as under: viz.—*

(*Signature*)

* Insert one of the following statements, as may be intended:—

(A) "in satisfaction of claim of plaintiff [*state name of party*]."

(B) "against claim of plaintiff [*state name of party*] with a defence denying liability."

Form No. 14a.

Request for Payment of Money lodged "in satisfaction," referred to in Rule 44 (a).

High Court of Justice— Division.

Request for Payment of Money Lodged, or Appropriated, in Satisfaction of Claim [under Rule 5 or Rule 11 of Order XXII].

Title of Cause or Matter *v.* 18 . *A.* No.

Ledger Credit [In Chancery Division]. } [If same as title of cause, state "As above."]

To the Assistant Paymaster-General.

I hereby request that the payment of sum of £ , paid in in the above action may be made to*

(*Signature*)
(*Address*)
(*Date*) 18 .

(*Signature of Witness*)
(*Address*)
(*Occupation*)

* N.B.—If payment is to be made to the plaintiff's solicitor, the plaintiff must himself sign the request, and insert therein the words "*the solicitor to me, the plaintiff (naming such solicitor)*"; but if payment is to be made to the plaintiff in person the request may be signed either by the plaintiff, who should insert "*me, the plaintiff,*" or by the solicitor of the plaintiff, who must insert "*the plaintiff (naming him).*" Payment will be made by a crossed cheque or crossed form of receipt, which must be passed through a bank.

Form No. 14b.

Request for Payment of Money lodged "against claim," referred to in Rule 44 (b).

HIGH COURT OF JUSTICE— DIVISION.

Request for payment of money lodged or appropriated against claim, with defence denying liability [under Rule 6 or Rule 11 of Order XXII].

Title of Cause or Matter *v.* 18 . *A.* No.

Ledger Credit [In Chancery Division]. } [If same as title of cause, state "As above."]

To the Assistant Paymaster-General.

I hereby notify that the sum of £ paid in in the above action has been accepted by the plaintiff in satisfaction of the claim in respect of which it is paid in, and I decare that due notice has been given of such acceptance thereof. And I request that payment of the said sum may be made to*

(*Signature*)
(*Address*)
(*Date*) 18

(*Signature of Witness*)
(*Address*)
(*Occupation*)

* N.B.—If payment is to be made to the plaintiff's solicitor, the plaintiff must himself sign the request, and insert therein the words "*the solicitor to me, the plaintiff (naming such solicitor)*"; but if payment is to be made to the plaintiff in person the request may be signed either by the plaintiff, who should insert "*me, the plaintiff,*" or by the solicitor of the plaintiff, who must insert "*the plaintiff (naming him).*" Payment will be made by a crossed cheque or crossed form of receipt, which must be passed through a bank.

Form No. 14c.

Certificate as to Person Entitled to Money lodged "as security for costs," referred to in Rule 44 (c).

HIGH COURT OF JUSTICE— DIVISION.

Title of Cause or Matter in which the money was originally lodged } *v.* 18 . *A.* No.

Ledger Credit. [If same as title of cause, state "As above."]

In pursuance of Rule 44 (*c*) of the Supreme Court Funds Rules, and Rule 27 (*a*) of Order XXXI. of the Rules of the Supreme Court, October, 1884, I certify that (A)

is or are entitled to payment of the total sum of £ lodged in Court in the above cause or matter as under, by or on behalf of the (B) to a security for costs account under Rule 26 of Order XXXI. of the Rules of the Supreme Court, 1883, viz.:—

On 18 . £

On 18 . £

Dated this day of , 18 .

(*Signature*)

(*Title of Office*)

N.B.—The person applying for payment may be required to produce the receipt of the Bank of England for the lodgment of the amount.

(A) Name of person to be paid, and whether as plaintiff or defendant, or as solicitor to plaintiff or defendant.

(B) Plaintiff or defendant.

Form No. 15.

Declaration (referred to in Rule 62) to be made by a Relative of a Person who has died intestate, when Letters of Administration have not been taken out, and when the total Assets of the estate of the Deceased have not exceeded the value of £100.

I (A) solemnly declare that I am the (B) and next or one of the next of kin of (C) who died on 18 , and that I am entitled to take out administration to his estate, and to receive the sum of £ directed to be paid to him by the Order dated 18 .

And I further declare that the total value of the assets of the deceased, including the above sum, does not exceed £100; and I certify that the death-bed and funeral expenses of the deceased have been paid. And I make this solemn declaration conscientiously believing the same to be true.

(*Signature of Applicant*)

(*Address*)

Declared before me this 18

Magistrate of
or
Minister of
or
Commissioner to administer oaths

We certify that the person who has signed the above declaration is personally known to us, and that we believe his or her statement to be true.

} To be signed by two householders resident in the Parish.

I certify that the persons whose signatures are last above subscribed are resident householders in this Parish.

Minister in the Parish of

(A) Name of applicant. (B) Degree of relationship. (C) Name of deceased.

Form No. 16.

Request for Lodgment without an affidavit under The Trustee Act, 1893, and Certificate of Commissioners of Inland Revenue to be furnished therewith, referred to in Rule 41.

TRUSTEE ACT, 1893.—Legacy (*or* Share of Residue) of *E. F.* under the Will (*or* Intestacy) of *C. D.*

A. B., the executor of the Will (*or* administrator of the estate) of *C. D.* deceased, whose Will was proved (*or* of whose effects letters of administration were granted) on the day of proposes to lodge in Court to the credit of "Legacy to (*or* "Share of residue of) *E. F.*, an infant (*or* beyond seas) under the Will (*or* intestacy) of *C. D.*," the sum of *£ (*or* the following securities representing) the full amount (*or* part) of such legacy (*or* share of residue) to which the said *E.F.* is absolutely entitled [*describe securities, if any, which must be such as the Paymaster can properly accept*].

CERTIFICATE OF COMMISSIONERS OF INLAND REVENUE (to accompany above Request).

(A) *If Duty has been paid.*

Reg. of the year 18 . Fo.

I certify that the sum of £ was paid on the day of for legacy duty, at the rate of per cent. in respect of the above-mentioned (*state amount of money or describe securities*) payable to , described as a of the deceased.

Dated the day of .

By order of the Commissioners of Inland Revenue.

(*Signed*)

(B) *If no Duty is chargeable.*

Reg. of the year 18 . Fo.

I certify that no legacy duty is chargeable in respect of the above-mentioned (*state amount of money or describe securities*) payable to *E. F.*, described as a of the deceased, inasmuch as such sum is (*or* such securities are) stated to be part of the personal estate of the deceased, upon the value whereof stamp duty has been paid under Section 27 (*or* 33) of the Act 44 Vict. c. 12, and therefore exempt from legacy duty under Section 41 (*or* 35) of that Act.

Dated the day of .

By order of the Commissioners of Inland Revenue.

(*Signed*)

* No deduction for costs and expenses must be made from the amount to be paid in.

APPENDIX IV.

PART C.

THE JUDICIAL TRUSTEE RULES, 1897.

ARRANGEMENT OF RULES.

RULE

1. Short title.

APPOINTMENT OF JUDICIAL TRUSTEE.

2. Mode of making application.
3. Service of summons.
4. Statement to be supplied on application.
5. Removal of restriction as to appointment of certain persons to be trustees.
6. Vesting orders.

APPOINTMENT OF OFFICIAL OF COURT TO BE JUDICIAL TRUSTEE.

7. Official judicial trustee.

ADMINISTRATION OF THE TRUST.

8. Statement of trust property.
9. Security.
10. Trust account at bank and custody of documents.
11. Judicial trustee not to keep money in his hands.
12. Directions to judicial trustees.
13. Power to dispense with formal evidence.

ACCOUNTS AND AUDIT.

14. Accounts and audit.
15. Filing and inspection of accounts.
16. Deductions allowed.

RULE

REMUNERATION AND ALLOWANCES.

17. Remuneration of judicial trustee.
18. Application of remuneration of official of the Court.
19. Forfeiture of remuneration.

REMOVAL AND SUSPENSION OF JUDICIAL TRUSTEE.

20. Suspension of judicial trustee.
21. Removal of judicial trustee.
22. Inquiry into conduct of judicial trustee.

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SCHEDULE.

RULES UNDER THE JUDICIAL TRUSTEES ACT, 1896.

1. *Short title* (59 & 60 *Vict. c.* 35).—The following Rules may be cited as The Judicial Trustee Rules, 1897, and shall apply as far as practicable to all matters and proceedings under The Judicial Trustees Act, 1896 (in these Rules called "the Act").

Appointment of Judicial Trustee.

2. *Mode of making application.*—An application to the Court to appoint a judicial trustee shall be in the Chancery Division, and

(*a*) if not made in a pending cause or matter, shall be made by originating summons; and

(*b*) if made in a pending cause or matter, shall be made as part of the relief claimed, or by summons in the cause or matter.

If the application be made in a pending matter it will have to be intituled in that matter. If made as a substantive application not in any pending cause or matter, it will be by originating summons and probably have to be intituled "In the matter of the Trust [*describing it*] and In the matter of The Judicial Trustees Act, 1896" (see Appendix V., Form 21). Order XXX. of the Rules of the Supreme Court will not apply to such an originating summons.

3. *Service of Summons.*—(1) The summons shall be served—

(*a*) where the application is made by or on behalf of a trustee, on the other trustee (if any); and

(*b*) where the application is made by or on behalf of a beneficiary, on the trustees (if any),

and in either case on such (if any) of the beneficiaries as the Court directs.

(2) Where the application is made by or on behalf of a person creating or intending to create a trust, the summons, subject to any direction of the Court, need not be served on any person.

(3) The Court may give any directions it thinks fit, either dispensing with the service of the summons on any person on whom it is required to be served under this Rule, or requiring the service of the summons on any person on whom it is not required to be served under this Rule.

The direction of the Court appears to be necessary in all cases as to the persons who should be made respondents to the summons.

4. *Statement to be supplied on application.*—(1) Where an application is made for the appointment of a judicial trustee by originating summons, the applicant must, when he takes out the summons, supply for the use of the Court a written statement signed by him containing the following particulars so far as he can gain information with regard to them:—

(*a*) A short description of the trust and instrument by which it is, or is to be, created, and of the relation which the applicant bears to the trust.

(*b*) If a person is nominated as judicial trustee the name and address of the person nominated, and short particulars of the reasons which lead to his nomination.

(*c*) If a person is nominated as judicial trustee, a statement whether it is proposed that the person nominated should be remunerated or not.

(*d*) Short particulars of the trust property, with an approximate estimate of its income and capital value.

(*e*) Short particulars of the incumbrances (if any) affecting the trust property.

(*f*) A statement whether it is proposed that the judicial trustee should be a sole trustee or should act jointly with other trustees.

(*g*) Particulars as to the persons who are in possession of the documents relating to the trust.

(*h*) The names and addresses of the beneficiaries and short particulars of their respective interests.

(*i*) Any exceptional circumstances specially affecting the administration of the trust.

(2) An affidavit by the applicant verifying the statement shall be sufficient *primâ facie* evidence of the particulars contained in the statement.

(3) Where the applicant cannot gain the information necessary for making the required statement on any point, he must mention the fact in his statement.

For form of statement and affidavit in support see Appendix V., Forms 22 and 23. The Rule requires the person who makes this statement to supply the information so far as he can gain it.

5. *Removal of restriction as to appointment of certain persons to be trustees.*—(1) The Court shall not be precluded by any existing practice as to the appointment of trustees from appointing any person to be a judicial trustee by reason of that person being a beneficiary, or a relation or husband or wife of a beneficiary, or a solicitor to the trust or to the trustee or to any beneficiary, or a married woman, or standing in any special position with regard to the trust.

(2) A person may be appointed to be a judicial trustee of a trust although he is already a trustee of the trust.

This is a very important deviation from the usual practice. Generally the Court is very reluctant to appoint as trustees the persons mentioned in this Rule. It is, however, no doubt considered safe to relax the practice in the case of the appointment of a judicial trustee, the Court having considerable hold over such a trustee by reason of the security he will have to give (see Rule 9).

It is also to be noticed that the Court can appoint an existing trustee a judicial trustee of a fund; hence trustees of a fund can be converted into judicial trustees.

6. *Vesting orders.*—On the appointment of any person to be judicial trustee the Court shall make such vesting or other orders and exercise such other powers as may be necessary for vesting the trust property in the judicial trustee, either as sole trustee or jointly with other trustees as the case requires.

The "other powers" here mentioned would doubtless comprise the power of ordering the execution of deeds, or the doing of other acts by an existing trustee, or even a beneficiary, where such execution or act is necessary to the proper vesting in the judicial trustee of the trust fund.

APPOINTMENT OF OFFICIAL OF COURT TO BE JUDICIAL TRUSTEE.

7. *Official judicial trustee.*—(1) When an official of the Court is appointed judicial trustee the official solicitor of the Court shall (subject to the provisions hereinafter contained in Rules 29, 30, and 31) be so appointed, unless, for special reasons, the Court directs that some other official of the Court should be so appointed.

(2) Any official of the Court appointed to be a judicial trustee shall, on his ceasing to hold office, cease to be such a trustee without any formal resignation.

(3) Where an official of the Court is judicial trustee, any trust property vested in or held by him shall be vested in and held by him under his official title and not in his own name.

(4) Where an official of the Court appointed to be a judicial trustee of a trust dies, or ceases to hold office, his successor in office shall, unless the Court otherwise directs, become judicial trustee of the trust without any Order of the Court or formal appointment, and the trust property shall, without any conveyance, assignment, or transfer, in such a case become vested in the successor as it was vested in his predecessor in office.

(5) For the purpose of the definition of "Official of the Court" in Section 5 of the Act, any paid office in or connected with the Court shall be a prescribed office.

ADMINISTRATION OF THE TRUST.

8. *Statement of trust property.*—(1) A judicial trustee must, unless in any case the Court considers that it is unnecessary, as soon as may be after his appointment, furnish the Court with a complete statement of the trust property, accompanied with an approximate estimate of the income and capital value of each item.

(2) It shall be the duty of the judicial trustee to give such information to the Court as may be necessary for the purpose of keeping the statement of the trust property correct for the time being.

This statement of the trust property is, apparently, in addition to the statement to be furnished to the Court when the application for the appointment of a judicial trustee is made. The intention clearly is that the trustee shall, as soon as he can acquaint himself with the trust funds, give the Court full information as to their amount and yield, and that he shall from time to time keep this statement up to date.

9. *Security.*—(1) A judicial trustee, if not an official of the Court, must give security to the Court for the due application of the trust property, unless the Court dispenses with security under this Rule.

(2) The Court may on the appointment of a judicial trustee, or at any time during his continuance in office as judicial trustee, dispense with security on the application either of the person who is to be appointed or is judicial trustee, or of any person appearing to the Court to be interested in the trust, and shall do so where a judicial trustee is appointed on the application of a person creating or intending to create a trust, and that person desires that security should be dispensed with, unless for special reasons the Court considers that security is in such a case necessary or desirable.

(3) The security must be given, either by recognisance, bond, or otherwise, as the Court directs, and with such sureties as the Court approves.

(4) If the Court is satisfied that sufficient provision is made for the safety of the capital of the trust property, the amount of the security shall, in ordinary cases, be an amount exceeding by twenty per centum the income of the trust property as estimated by the Court.

(5) The Court may at any time require that the amount or nature of the security given by a judicial trustee under this Rule be varied, or that security be given where it has previously been dispensed with, and a judicial trustee shall comply with any such requirement.

(6) It shall be a condition of every recognisance, bond, or other form of security given under this Rule that the judicial trustee shall give immediate notice to the Court of the death or insolvency of any of his sureties.

(7) Any recognisance, bond, or other form of security given for the purpose of this Rule may be vacated in such manner and subject to such conditions as the Court may direct.

(8) Where security is not dispensed with, the appointment of a person to be judicial trustee shall not take effect until he has given the security required by the Court under this Rule.

(9) Any premium payable by a judicial trustee to any guarantee company on account of his security may, if the Court so directs, be paid out of the trust property.

This Rule amply provides for security being given by the judicial trustee, though the Court may in the cases therein mentioned dispense with it. It will often be found convenient to have the intervention of a guarantee company, in which case Sub-rule 9 permits the premium payable to such company being paid out of the trust property. Sub-rule 4 appears to mean that if the Court is satisfied as to the safety of the capital of the fund by its being properly invested, then the security to be given by the trustee must exceed by twenty per cent. the income of the property.

10. *Trust account at bank and custody of documents.*—(1) When a judicial trustee is appointed, a separate account for receipts and payments on behalf of the trust must be kept in the name of the trustees at some bank approved by the Court.

(2) All title deeds and all certificates and other documents which are evidence of the title of the trustee to any of the trust property shall be deposited either with that bank or in such other custody as the Court directs.

(3) The deeds or documents must be deposited in the names of the trustees, and the judicial trustee must give notice to the body or person with whom the deeds or documents are so deposited not to deliver any of them over to any person except on a request signed by the judicial trustee and countersigned by the officer of the Court, and also to allow any person authorised by the officer of the Court in writing to inspect them during business hours.

(4) The judicial trustee must deposit with the Court a list of all deeds or documents deposited in any custody in pursuance of this Rule, and must give information to the Court from time to time of any variation to be made in the list.

(5) The judicial trustee must, if at any time directed by the Court, give an order to the bank at which the trust account is kept not to pay at any one time any sum over a specified amount out of the trust account, except on an order countersigned by the officer of the Court.

(6) Any payments on account of the income of the trust property may be provided for by means of a standing order to the bank at which the trust account is kept.

(7) The Court may give such directions to the judicial trustee as may, in the opinion of the Court, be necessary or expedient for carrying this Rule into effect, and for securing the safety of the trust property.

(8) Where an official of the Court is judicial trustee, the Court may direct that, instead of a separate account of the receipts and payments on behalf of the trust being kept at some bank approved by the Court, all receipts on behalf of the trust may be dealt with, and all payments on behalf of the trust may be made, in such manner, and subject to such regulations as to the accounts to be kept of the receipts and payments and the procedure to be followed in dealing therewith, as the Treasury direct.

This Rule sufficiently explains itself. It comprises a code of careful regulations for the guidance and direction of the judicial trustee.

By The Interpretation Act, 1889, the expression "the Treasury" means the Lord High Treasurer for the time being, or the Commissioners for the time being of Her Majesty's Treasury.

11. *Judicial trustee not to keep money in his hands.*—A judicial trustee must pay all money coming into his hands on account of his trust without delay to the trust account at the bank, and if he keeps any such money in his hands for a longer time than the Court considers necessary, shall be liable to pay interest upon it, at such rate not exceeding five per centum as the Court may fix, for the time during which the money remains in his hands.

12. *Directions to judicial trustees.*—(1) A judicial trustee may at any time request the Court to give him directions as to the trust or its administration.

(2) The request must be accompanied by a statement of the facts with regard to which directions are required, and by the fee required under these Rules in respect of a communication from the Court with regard to the administration of the trust.

(3) The Court may require the trustee or any other person to attend at Chambers if it appears that such an attendance is necessary

or convenient for the purpose of obtaining any information or explanation required for properly giving directions, or for the purpose of explaining the nature of the directions.

A summons is not necessary for an application to the Court by a judicial trustee for directions, unless the Court deems it necessary (see Rule 28). As to the fee see the Schedule to the Rules (p. 279, *post*).

13. *Power to dispense with formal evidence.*—The Court, if satisfied that there is no reasonable doubt of any fact which affects the administration of a trust by a judicial trustee, may give directions to the judicial trustee to act without formal proof of the fact.

ACCOUNTS AND AUDIT.

14. *Accounts and audit.*—(1) The Court shall give directions to a judicial trustee as to the date to which the accounts of the trust are to be made up in each year, and shall fix in each year the time after that date within which the accounts are to be delivered to it for audit.

(2) The accounts shall in ordinary cases be audited by the officer of the Court, but the Court, if it considers that the accounts are likely to involve questions of difficulty, may refer them to a professional accountant for report, and order the payment to him of such amount in respect of his report as the Court may fix.

15. *Filing and inspection of accounts.*—(1) The accounts of any trust of which there is a judicial trustee, with a note of any corrections made upon the audit, shall be filed as the Court directs.

(2) The judicial trustee shall send a copy of the accounts, or, if the Court thinks fit, of a summary of the accounts, of the trust to such beneficiaries or other persons as the Court thinks proper.

(3) The Court may, if it thinks fit, having regard to the nature of the relation of the applicant to the trust, allow any person applying to inspect the filed accounts so to inspect them on giving reasonable notice to the officer of the Court.

This Rule provides ample opportunity for examination of the accounts of a judicial trustee.

16. *Deductions allowed.*—A judicial trustee shall, unless the Court otherwise directs, be allowed on the audit of his accounts deductions made on account of his remuneration and allowances under these Rules and also on account of the fees paid by him under these Rules, but shall not be allowed any deduction on account of the expenses of professional assistance, or his own work or personal outlay, unless the deduction has been authorised by the Court in pursuance of the Act, or the Court is satisfied that the deduction is justified by the strict necessity of the case.

REMUNERATION AND ALLOWANCES.

17. *Remuneration of judicial trustee.*—(1) Where a judicial trustee is to be remunerated the remuneration to be paid to him shall be fixed by the Court, and may be altered by the Court from time to time.

(2) In fixing the remuneration, regard shall be had to the duties entailed upon the judicial trustee by the trust.

(3) The Court may make, if it thinks fit, special allowances to judicial trustees for the following matters, to be paid out of the trust property—

(*a*) For the statement of trust property prepared by a judicial trustee on his appointment, an allowance not exceeding ten guineas.

(*b*) For realising and reinvesting trust property, where the property is realised for the purpose of reinvestment, an allowance not exceeding one and a half per centum on the amount realised and reinvested.

(*c*) For realising or investing trust property in any other case, an allowance not exceeding one per centum on the amount realised or invested.

(4) The Court may also in any year make a special allowance to a judicial trustee, if satisfied that in that year more trouble has been thrown upon the trustee by reason of exceptional circumstances than would ordinarily be involved in the administration of the trust.

(5) Where a trustee is remunerated, any allowance under this Rule may be paid in addition to his remuneration.

(6) Any remuneration or allowance payable to a judicial trustee shall be paid or allowed to him at such times and in such manner as the Court directs.

This Rule provides for "special allowances" in addition to the remuneration fixed by the Court.

18. *Application of remuneration of official of the Court.*—Where an official of the Court is appointed to be a judicial trustee, any remuneration, allowances, or other payments payable to him on account of his services as trustee shall be paid, accounted for, and applied in such manner as the Treasury direct.

19. *Forfeiture of remuneration.*—(1) If the Court is satisfied that a judicial trustee has failed to comply with the Act, or with these Rules, or with any direction of the Court or officer of the Court made in accordance with the Act or these Rules, or has otherwise misconducted himself in relation to the trust, the Court may order that the whole or any part of the remuneration of the trustee be forfeited.

(2) This Rule shall not affect any liability of the judicial trustee for breach of trust or to be removed or suspended.

(3) A judicial trustee shall have an opportunity of being heard by the Court before any order is made for the forfeiture of his remuneration or any part of it.

Removal and Suspension of Judicial Trustee.

20. *Suspension of judicial trustee.*—(1) The Court may at any time, either without any application or on the application of any person appearing to the Court to be interested in the trust, suspend a judicial trustee, if the Court considers that it is expedient to do so in the interests of the trust, and a judicial trustee while suspended shall not have power to act as trustee.

(2) When a judicial trustee is suspended, the Court shall cause notice to be given to such of the persons appearing to the Court

to be interested in the trust as the Court directs, and also to the persons having the custody of the trust property, and shall give any other directions which appear necessary for securing the safety of the trust property.

The Court could under this Rule issue stop orders preventing the funds being dealt with.

Apparently a summons is not necessary for the *suspension* merely of a trustee (see Rule 28, Sub-rule 1); *sed contra* if the trustee is to be removed (see Rule 21, Sub-rule 1). It is, however, likely that the Court would, under Rule 28, direct a summons to be taken out in order to clearly have before it the grounds urged for the trustee's suspension.

21. *Removal of judicial trustee.*—(1) The Court may, either without any application or on the application of any person appearing to the Court to be interested in the trust, remove a judicial trustee if the Court considers that it is expedient to do so in the interests of the trust.

(2) Any application to remove a judicial trustee must be made by summons.

(3) A judicial trustee shall not be removed by the Court without an application for the purpose, except after notice has been given to him by the Court of the grounds on which it is proposed to remove him, and of the time and place at which the matter will be heard.

(4) The Court shall cause a copy of the notice to the trustee to be sent to such of the persons appearing to the Court to be interested in the trust as the Court directs, and the same procedure shall be followed in the matter as far as possible as on a summons to remove a judicial trustee.

The application for removal of a judicial trustee must be made by summons (see Sub-rule 2, and also Rule 28, Sub-rule 1).

For summons for removal of a judicial trustee see Appendix V., Form 24.

The Court can of its own mere motion remove a judicial trustee, but must first give him and other persons notice as provided in Sub-rules 3 and 4.

22. *Inquiry into conduct of judicial trustee.*—Where an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, is ordered, the

inquiry shall, unless the Court otherwise directs, be conducted by the officer of the Court, and he shall have the same powers in relation thereto as he has in relation to any other inquiry directed by the Court.

RESIGNATION AND DISCONTINUANCE OF JUDICIAL TRUSTEE.

23. *Resignation of judicial trustee.*—(1) If a judicial trustee desires to be discharged from his trust he must give notice to the Court, stating at the same time what arrangements it is proposed to make with regard to the appointment of a successor.

(2) The Court shall give facilities for the appointment on a proper application of an official of the Court to be judicial trustee in place of a judicial trustee who desires to be discharged, in cases where no fit and proper person appears available for the office, or where the Court considers that such an appointment is convenient or expedient in the interests of the trust.

24. *Discontinuance of judicial trustee.*—(1) Where there is a judicial trustee of a trust, the Court may at any time, on the application made by summons of any person appearing to the Court to be interested in the trust, order that there shall cease to be a judicial trustee of the trust, whether the person who is judicial trustee continues as trustee or not.

(2) If the Court is satisfied that all the persons appearing to the Court to be interested in the trust concur in an application under this Rule, the Court shall accede to the application, and in any case shall ascertain as far as may be the wishes of those appearing to the Court to be interested in the trust with regard to the application.

(3) Where an order is made under this Rule the Court shall make all such orders as may be necessary for carrying it into effect, and where, in pursuance of any such order, a new trustee is appointed in the place of an official of the Court, shall make all such vesting or other orders and exercise all such other powers as may be necessary for vesting the trust property in the new trustee, either as sole trustee or jointly with other trustees as the case requires.

For Form of Application see Appendix V., Form 25.

SPECIAL TRUSTS.

25. *Executors and administrators.*—(1) Any person who is an executor or administrator may be appointed a judicial trustee for the purpose of the collection and distribution of the estate of a deceased person in the same manner and subject to the same provisions as in the case of an ordinary trust.

(2) Where an administrator has given an administration bond, he need not give security as a judicial trustee under these Rules unless the Court directs that he is to do so.

26. *Special trusts.*—(1) An official of the Court shall not be appointed or act as judicial trustee for any persons in their capacity as members or debenture holders of, or being in any other relation to, any incorporated or unincorporated company or any club.

(2) Where the circumstances of any trust of which an official of the Court is a judicial trustee, or of which it is proposed to appoint an official of the Court to be a judicial trustee, involve the carrying on of any trade or business, special intimation of the fact shall be given to the Court either by the judicial trustee or by the person making the application for the appointment of the judicial trustee, as the case may be, and the Court shall specially consider the facts of the case with a view to determining whether the official of the Court should continue or be appointed as judicial trustee, and whether any special conditions should be made or directions given with a view to ensuring the proper supervision of the trade or business.

Rule 7, Sub-rule 5, defines "official of the Court" as any paid officer "in or connected with the Court."

The special circumstances referred to in Sub-rule 2 must be mentioned in the statement prescribed by Rule 4.

EXERCISE OF THE POWERS OF THE COURT.

27. *Exercise of powers of Court.*—For the purpose of the Act or these Rules the officer of the Court may exercise any power which may be exercised by the Court (including the power of

making an order for the appointment of a judicial trustee or making any vesting order), and may perform any duty to be performed by the Court, and may hear and investigate any matter which may be heard or investigated by the Court, subject in any case to the right of any party to bring any particular point before the Judge.

28. *Communication between judicial trustee and Court.*—(1) It shall not be necessary to take out a summons for any purpose under the Act or these Rules, except in cases where a summons is required by these Rules, or where the Court directs a summons to be taken out.

(2) Where a judicial trustee desires to make any application or request to the Court, or to communicate with the Court as to the administration of his trust, he may do so by letter addressed to the officer of the Court without any further formality.

(3) The Court may give any direction to a judicial trustee with regard to the administration of his trust by letter signed by the officer of the Court, and addressed to the trustee, without drawing up any order or formal document.

(4) For the purpose of the attendance at Chambers of the judicial trustee or any other person connected with the trust for purposes relating to the administration of the trust, the officer of the Court may make such appointments as he thinks fit by letter without the service of formal notices.

(5) Any document may be supplied for the use of the Court by leaving it with, or sending it by post to, the officer of the Court.

For the definition of "officer of the Court" see Rule 33.

District Registries.

29. *District Registries.*—(1) An originating summons under these Rules, for the purpose of an application to appoint a judicial trustee, may be sealed and issued in a District Registry, and appearances thereon shall be entered in that Registry.

(2) Where a judicial trustee of a trust is appointed on an originating summons taken out in a District Registry, or an application in any cause or matter pending in a District Registry, all proceedings with respect to the trust and the administration thereof under the Act or these Rules shall, unless the Court otherwise directs, be taken in the District Registry.

(3) Where proceedings under the Act or these Rules are taken in the District Registry, the official of the Court to be appointed judicial trustee, where an official of the Court is to be so appointed, shall not be the official solicitor, unless the Court for special reasons otherwise directs.

(4) For the purpose of the Act and these Rules the Court may transfer any trust of which there is a judicial trustee from a District Registry to London, or from London to a District Registry, or from one District Registry to another District Registry, according as it appears convenient for the administration of the trust.

Palatine Courts.

30. *Palatine Courts.*—(1) These Rules shall apply to a Palatine Court as respects trusts within the jurisdiction of such Court, subject to such modifications (if any) as may be made by Rules of that Court for the purpose of making these Rules properly applicable, having regard to any special practice of the Court, or the duties of the officers attached to the Court.

(2) Where proceedings under the Act or these Rules are taken in the Palatine Court, the official of the Court to be appointed judicial trustee, where an official of the Court is to be so appointed, shall not be the official solicitor, unless the Palatine Court for special reasons otherwise directs.

County Courts.

31. *County Court jurisdiction.*—(1) For the purpose of the Act and these Rules the jurisdiction of the County Court Judge shall extend to any trust in which the trust property does not exceed in value five hundred pounds, as if that jurisdiction had been

given under Section 67 of The County Courts Act, 1888, but that jurisdiction shall be exercised only in a Metropolitan County Court, or in a County Court for the time being having bankruptcy jurisdiction.

(2) Where the district of any County Court (other than a Metropolitan County Court) or any part of such a district is attached for the purpose of bankruptcy jurisdiction to some Court other than the County Court of the district, that district or part shall be attached to the same Court for the purpose of jurisdiction under the Act and these Rules.

(3) Where proceedings under the Act or these Rules are taken in the County Court, the official of the Court to be appointed judicial trustee, where an official of the Court is to be so appointed, shall not be the official solicitor, unless the Court for special reasons otherwise directs.

(4) In the application of these Rules to the County Court a petition shall be substituted for a summons, whether an ordinary or an originating summons.

(5) For the purposes of this Rule the expression "Metropolitan County Court" means any of the County Courts mentioned in the Third Schedule of The Bankruptcy Act, 1883.

Fees.

32. *Fees.*—(1) The fees mentioned in the Schedule to these Rules shall be paid in respect of the matters therein mentioned.

(2) The fees paid by a judicial trustee may be deducted out of the income of the trust property unless the Court otherwise directs.

(3) Any fees payable under these Rules may be remitted by post, and may be so remitted in any manner except by means of postage stamps or coin.

(4) All fees payable under these Rules in the High Court, Palatine Court, or County Court shall, except as provided by these Rules, be subject to similar provisions as to payment, account, and application as other fees payable in those Courts respectively.

OFFICER OF THE COURT.

33. *Meaning of "Officer of Court."*—In these Rules the expression "officer of the Court" means—

(*a*) As regards proceedings in the High Court, other than proceedings in a District Registry, the Chancery Master, that is to say, the Master attached to the Chambers of the Judge of the Chancery Division to whom the matter is assigned; and

(*b*) As regards proceedings in a District Registry, any Registrar of that Registry; and

(*c*) As regards proceedings in a Palatine Court, any Registrar of that Court; and

(*d*) As regards proceedings in the County Court, the Registrar of the County Court.

SUPPLEMENTAL.

34. *Rules to be construed as part of the general Rules of Court.*—These Rules shall be construed, so far as they relate to the High Court, as one with the Rules of the Supreme Court, 1883, and any Rules amending those Rules, so far as they relate to a Palatine Court as one with the Rules of that Court, and so far as they relate to the County Court as one with the County Court Rules, 1889, and any Rules amending those Rules.

35. *Application of Interpretation Act* (52 & 53 *Vict. c.* 63).—The Interpretation Act, 1889, shall apply for the purpose of the interpretation of these Rules as it applies for the purpose of the interpretation of an Act of Parliament.

(Signed) HALSBURY, *C.*

31*st August*, 1897.

SCHEDULE.

FEES.

The following Fees shall be payable under these Rules—

	£ s. d.
1. In respect of any thing or matter for which a fee is provided under the Orders in force for the time being with regard to Supreme Court, Palatine Court, or County Court fees as the case may be - - - - - - - - -	The fee so provided.
2. In respect of any communication from the Court with regard to the administration of the trust	0 2 6
3. For filing the statement of the trust property -	0 10 0
4. For filing any alteration in the statement - -	0 5 0
5. For filing the accounts of the trust - - -	0 5 0
6. For filing any other document relating to the trust	0 2 6
7. For auditing the accounts of the trust when audited by the officer of the Court, for every £100, or fraction of £100, of the gross amount received as income of the trust without deducting any payments - - - - - - - - -	0 2 6
8. On the audit of the accounts of the trust where they are referred to a professional accountant for report - - - - - - - - -	A fee equal to the amount paid to the accountant.
9. On the inspection of filed accounts for each hour or part of an hour occupied - - - -	0 2 6
Not exceeding on one day - - - -	0 10 0

[*Recite intention to appoint new trustee.*]

Now this Indenture witnesseth that, in exercise of the power for this purpose by the principal Indenture [*or if no power is contained in the Settlement* by the Statute in that behalf, *or if the statutory power is expressly incorporated in the settlement* by the joint operation of the principal Indenture and the Statute in that behalf] given to the said A. and B., and of every or any other power in anywise enabling them in this behalf, they, the said A. and B., do hereby appoint the said [*new trustee*] to be a trustee of the principal Indenture in the place of the said [*deceased or retiring trustee*], and jointly with the said [*continuing trustees*], for the purposes of the principal Indenture or such of the same purposes as are still subsisting and capable of taking effect.

Form No. 2.

DEED OF APPOINTMENT OF NEW TRUSTEES, where a Separate Set of Trustees is appointed for a part of the Trust Property held on Trusts distinct from those relating to any other part.

See Section 10, Sub-section 2 (*b*), of The Trustee Act, 1893.

This Indenture, made &c. between A. of &c. of the one part, and B. of &c. and C. of &c. of the other part.

[*Recite Will of testator, whereby testator, after appointing A. and Z. executors and trustees, gave his residuary personal estate to A. and Z. upon trust to convert, and, after payment of debts &c., to invest net moneys arising from conversion, and hold same in trust for his three daughters in equal shares, the share of each daughter to be held in trust for her and her children by way of settlement.*]

[*Recite death and probate.*]

[*Recite conversion of residuary personal estate, payment of debts, &c., and investment of residue of moneys arising from conversion.*]

And whereas the several stocks, shares, and securities specified in the schedule hereunder written represent the one-third share of the said residuary moneys set apart by the said A. and Z. to be held upon the trusts declared by the hereinbefore recited Will for the benefit of the said testator's daughter E. and her children:

[*Recite death of Z., and desire of A. to retire.*]

And whereas the said A. is desirous of appointing the said B. and C. to be trustees of the said one-third share of the said residuary moneys so held in trust for the said testator's said daughter E. and her children as aforesaid:

And whereas the said investments mentioned and specified in the said schedule are intended to be forthwith transferred by the said A. into the joint names of the said B. and C.:

Now this Indenture witnesseth that in pursuance of his said desire, and in exercise of the power for this purpose by the Statute in that behalf given to the said A., and of every or any other power in anywise enabling him in this behalf, he, the said A., doth hereby appoint the said B. and C. to be trustees of the hereinbefore recited Will of the said testator in the place or stead of the said Z. deceased and of him the said A., so far as regards the one-third share of the said residuary trust moneys of the said testator bequeathed by the said Will for the benefit of the said testator's said daughter E. and her children as in the said Will mentioned.

And it is hereby agreed and declared that the said B. and C., their executors, administrators, and assigns, shall stand possessed of the said stocks, shares, and securities specified in the said schedule, when the same shall have been transferred into the names of the said B. and C., upon the trusts and subject to the powers and provisions applicable thereto under or by virtue of the hereinbefore recited Will.

In witness &c.

SCHEDULE.

Form No. 3.

RECITAL OF DESIRE BY A TRUSTEE TO BE DISCHARGED, and Vesting Declaration vesting Land, Chattels, and the Right to Recover Debts and Things in Action in Continuing Trustees alone.

See Section 11 and Section 12, Sub-section 2, of The Trustee Act, 1893.

Recital of Desire to be Discharged.

And whereas the said [*retiring trustee*] is desirous of being discharged from the trusts of the said Will [*or* Indenture, *as the case may be*]:

Now this Indenture witnesseth that [*retiring trustee*] hereby declares that he is desirous of being discharged from the trusts of the said Will [*or* Indenture &c.].

Consent to Discharge.

And this Indenture further witnesseth that the said [*the persons (if any) empowered to appoint trustees and the continuing trustees*] hereby consent to the discharge of the said [*retiring trustee*] from the trusts aforesaid, and to the vesting in [*continuing trustees*] alone of the trust property.

Vesting Declaration of Land.

And this Indenture also witnesseth that the said [*retiring and continuing trustees and the appointor (if any)*] do [*or* doth *as the case may be*] hereby declare that all the estate and interest of the said [*retiring and continuing trustees*] and each of them in the [*land*] and hereditaments now subject to the trusts of the said Will [*or* Indenture dated &c., *as the case may be*] shall forthwith vest in the said [*continuing trustees*] alone, as joint tenants for the purposes and upon the trusts thereof.

Vesting Declaration of Chattels and Choses in Action.

And this Indenture also witnesseth that the said [*retiring and continuing trustees and the appointor (if any)*] do [*or* doth *as the*

case may be] hereby declare that all chattels, and also the right of the said [*retiring and continuing trustees*] to recover and receive all debts and things in action, subject to the trusts of the said Will [*or* Indenture dated &c.], shall forthwith vest in the said [*continuing trustees*] alone as trustees of the said Will [*or* Indenture dated &c.], and as joint tenants for the purposes and upon the trusts thereof.

Form No. 4.

VESTING DECLARATION in Deed of Appointment of New Trustees, vesting Land, Chattels, and the Right to Recover Choses in Action the subject of the Trust.

See Section 12, Sub-section 1, of The Trustee Act, 1893.

And this Indenture further witnesseth that the said [*appointor*], with the assent of the said [*continuing trustees*], hereby declares that all the estate and interest of the said [*old and continuing trustees*] in the [*land*] and hereditaments now subject to the trusts of the said Will [*or* Indenture dated &c.] (not being a legal estate or interest in copyhold or customary lands or hereditaments, and not being lands or hereditaments vested in the said [*outgoing and continuing trustees*] or any of them by way of mortgage for securing money subject to the said trusts) shall forthwith vest in the said [*new and continuing trustees*] as joint tenants as trustees of the said Will [*or* Indenture dated &c., *as the case may be*], for the purposes and upon the trusts thereof.

And this Indenture also witnesseth that the said [*appointor*], with the assent of the said [*continuing trustees*], hereby declares that all chattels and also the right to recover and receive all debts and other things in action now subject to the trusts of the said Will [*or* Indenture dated &c.] shall forthwith vest in the said [*new and continuing trustees*] and as joint tenants for the purposes and upon the trusts thereof.

Form No. 5.

SUMMONS FOR VESTING COPYHOLDS IN NEW TRUSTEES.

See Section 12, Sub-section 3, and Section 34 of The Trustee Act, 1893.

IN THE HIGH COURT OF JUSTICE, [*Letter and Number.*]
CHANCERY DIVISION.
MR. JUSTICE

In the Matter of the Trusts of the Will of A. B.
and
In the Matter of The Trustee Act, 1893.

Let , of , in the county of , within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of , of , in the county of , for an Order that—

The copyhold messuages or tenements known as , demised by the Will of the said to the said [*old trustees*], or other the copyhold messuages or tenements now subject to the trusts of the said Will of the said , may vest in the said [*new trustees*] as joint tenants as trustees of the said Will, and upon the trusts therein declared concerning the same, for such estate and interest as the said [*old trustees*], if living, would have, or as the said , the customary heir at law of the said [*last surviving trustee*] deceased, now has therein.

Or that such other Order may be made in the premises as to this Honourable Court shall seem meet.

Dated the

To

NOTE.—*The Order to be made on this summons is sought under Sections of The Trustee Act,* 1893.

This summons was taken out by , of , solicitor for the above-named .

The Respondent may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Respondent does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Form No. 6.

AFFIDAVIT IN SUPPORT OF SUMMONS FOR VESTING COPYHOLDS IN NEW TRUSTEES.

See Section 12, Sub-section 3, and Section 34 of The Trustee Act, 1893.

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]

CHANCERY DIVISION.

MR. JUSTICE .

[*Formal parts.*]

I, A. B., of &c., make oath and say:—

1. [*State Will of testatrix, devising copyholds to trustees.*]

2. [*Death of testatrix and probate of Will.*]

3. [*Death of trustee.*]

4. [*Death of surviving trustee and grant of letters of administration and any other necessary facts*].

5. The said E. F. [*last surviving trustee*] left him surviving as his customary heir according to the custom of the Manor of , wherein the said copyhold estate of the testatrix is situate, and which was vested in the said [*trustees*] as trustees of the said Will, his nephew [*or as the case may be*] F. G.

6. The said copyhold estate of the testatrix, subject to the trusts of the said Will herein set forth, now consists of [*state particulars*], and this deponent is advised and submits that the said copyhold estate upon the decease of the said [*trustee*] intestate as aforesaid became and now is vested in the said F. G. as such customary heir upon the trusts of the said Will.

7. The said F. G. has for some time past been and is now resident out of the jurisdiction of this Honourable Court, and is of unsound mind not so found, and has for some time past been and is now confined in the [*asylum*].*

8. [*State appointment by deed of new trustees of the Will and the vesting in them of freeholds.*]

9. Under the circumstances hereinbefore set forth, it is necessary and expedient that a vesting order should be made by this Honourable Court vesting in the said [*new trustees*] as such trustees the said copyhold hereditaments for such estate and interest as the said [*original trustees*] if living would have, or as the said F. G., the customary heir of the said [*last surviving trustee*], now has therein.†

Form No. 7.

ORIGINATING SUMMONS FOR APPOINTMENT OF NEW TRUSTEES.

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]

CHANCERY DIVISION.

MR. JUSTICE .

In the Matter of the Trusts of an Indenture of Settlement dated &c., made between &c. [*or* the Will of A. B. dated &c.]

and

In the Matter of The Trustee Act, 1893.

Let , of , within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application [under Order LV., Rule 13 (*a*), of the

* This allegation obviates service on F. G. (see *re* East, 8 Ch. 735, and *re* Green, 10 Ch. 272).

† There should also be an affidavit by the steward of the manor that according to the custom of the manor F. G. is the heir of the last surviving trustee.

Rules of the Supreme Court, *or as the case may be*] of E. F., of , in the county of [*being respectively trustees or beneficiaries under the said Will or Settlement*], for an Order—

1. That G. H., of , in the county of , and I. J., of , in the county of , may be appointed trustees of the said Will [*or* Indenture of Settlement] in the place of [*old trustee*] and [*old trustee*] respectively deceased.

2. That the messuages, tenements, lands, and hereditaments situate in [*place*] now subject to the trusts of the said Will [*or* Indenture of Settlement], and all other (if any) the lands and hereditaments so subject, may vest in the said G. H. and I. J. as such trustees as aforesaid for the estate and interest therein now vested in the said .

3. That the right to call for a transfer of and to transfer into their own names the sum of , subject to the trusts of the said Will [*or* Settlement], and to receive the dividends now due and to accrue due thereon, may be vested in the said G. H. and I. J. as the trustees thereof.

4. That the right to sue for and recover any chose in action subject to the trusts of the said Will [*or* Settlement] may vest in the said G. H. and I. J. as such trustees of the said Will [*or* Settlement].

5. That the costs of this application may be provided for.

Dated &c.

To

NOTE.—*The Order to be made on this summons is sought under Sections of The Trustee Act*, 1893.

This summons was taken out by , of , solicitor for the above-named .

The Respondent may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Respondent does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Form No. 8.

CONSENT OF NEW TRUSTEES TO ACT, AND VERIFICATION OF SIGNATURES.

[*Title and Reference to Record.*]

We, and , do hereby consent to act as trustees under the [*state nature of document creating the trust*].

Dated &c.

(Signed)

I , of , in the county of , Solicitor, hereby certify that the above-written signatures are the signatures of and , the persons mentioned in the above-written Consent.

(Signed)
Solicitor for the [*state whom*].

Form No. 9.

AFFIDAVIT OF FITNESS OF PROPOSED TRUSTEES.*

Filed . [*Title and Reference to Record.*]

I , of , make oath and say as follows:—

1. I have for years last past known and been well acquainted with , of , and , of , the persons proposed to be appointed new trustees of the Will of , late of , deceased, the testator in the summons in the above matter mentioned.

2. The said has for years last past carried on business as a at , in the city [*or* county] of . The said has for years past carried on business as a at , in the city [*or* county] of .

* One affidavit seems sufficient (see *re* Arden, W. N. [1887] 166). As to contents of such an affidavit see *re* Castle, Sterry's Trust (W. N. [1888] 179).

3. During my acquaintance with them I have had many opportunities of forming an opinion as to their habits of business and integrity. The said and respectively are persons in good credit in the neighbourhood in which they respectively carry on business as aforesaid, and are both men of business habits and of strict honour and integrity.

4. In my judgment and opinion the said and are fit, proper, and eligible persons to be appointed new trustees of the said Will.

Sworn &c.

This Affidavit is filed &c.

Form No. 10.

AFFIDAVIT BY TRUSTEE ON PAYMENT INTO COURT OF MONEY OR SECURITIES BELONGING TO A TRUST, WITH LODGMENT SCHEDULE.

See Section 42 of The Trustee Act, 1893.

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

In the Matter of the Trusts of a Sum of £ bequeathed &c.

and

In the Matter of The Trustee Act, 1893.

I, A. B., of , make oath and say as follows:—

1. The office of , situate at , in the county of , is the place where I am to be served with any petition, summons, or order, or with notice of any proceeding relating to the trust fund hereinafter mentioned.

2. Under the provisions of the above-mentioned Act, I propose to pay and transfer into Court the funds mentioned in the Schedule hereto to the credit in the said Schedule mentioned.

3. [*State Will or other document &c. under which the trust arose.*]

4. The said [*testatrix*] died on the day of without having altered or revoked her said Will, and the same was duly proved on the day of by in the Principal Registry of Her Majesty's Court of Probate.

5. On the death of the said testatrix I and the said possessed ourselves of her personal estate and effects, and thereout paid her just debts and funeral and testamentary expenses, and also paid and satisfied the said legacies bequeathed by the said Will, other than the said legacy of £ so bequeathed to the said as aforesaid, and on the day of we appropriated and set apart out of the assets of the said testatrix the sum of £ to answer the said [*legacy*] to the said , and invested such sum in the purchase in our joint names of the sum of £ New Consols.

6. [*State decease or otherwise of other trustees and the facts rendering necessary the payment in.*]

7. I have received the sum of £ for the dividend which accrued due on the said sum of £ New Consols on the day of , and, after deducting and retaining thereout the sum of £ for the costs of paying and transferring the said trust fund into Court, there remains the sum of £ cash, and which sums of £ New Consols and £ cash I propose to transfer and pay into Court as in the said Schedule hereto stated.

8. To the best of my knowledge and belief, the only persons interested in or entitled to the said sums of £ New Consols and £ cash are .*

9. I submit to answer all such inquiries relating to the application of the said sums of £ New Consols and £ cash as this Court, or any Judge thereof at Chambers, may think proper to make or direct.

Sworn, &c.

* It is necessary to state these particulars. See Order LIVB., Rule 4, Sub-rule 1 (*b*), of the Rules of the Supreme Court (Trustee Act), 1893, *ante*, p. 201.

LODGMENT SCHEDULE.

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

Date of Order , 189 .

Filed , 189 .

Title of Cause or Matter 189 . *A.* No. .

Ledger Credit { In the Matter of the Trusts of the Sum of £ bequeathed by the Will of in favour of (subject to legacy duty).*

Particulars of Funds to be lodged.	Name and Address of Person to make lodgment.	Amounts.	
		Money.	Securities.
[Consols] Cash. †No part of the legacy duty has been paid [*or* all the legacy duty has been paid]. It is desired that the above sum of cash, and the dividends to accrue on the above Consols, may be invested in like Consols and accumulated [*or* It is deemed unnecessary to invest the above sum of cash and the dividends on the above Consols].	of in the County of		

* No heading should have more than thirty-six words (see Supreme Court Funds Rules, 1894, Rule 103, *ante*, p. 242).

† If no duty is payable on the funds to be paid in, it should be so stated.

Form No. 11.

DIRECTION FOR LODGMENT OF GOVERNMENT SECURITIES.

Ledger Credit, Fol. { *Re* Trusts of the sum of £ bequeathed by the Will of in favour of (subject to legacy duty).

To The Governor and Company of the Bank of England.

PAY OFFICE, ROYAL COURTS OF JUSTICE,

189 .

Authority is hereby given for the transfer by to the account of the Paymaster-General, for and on behalf of the Supreme Court of Judicature, of the sum of £ New Consols, such transfer being made pursuant to The Trustee Act, 1893, and an affidavit filed the day of 189 .

(Signed)

Form No. 12.

CERTIFICATE OF TRANSFER.

BANK OF ENGLAND,

189 .

To The Assistant Paymaster-General.

The above-mentioned securities have been this day transferred to the account of the Paymaster-General.

For The Governor and Company of the Bank of England,

(Signed)

Form No. 13.

NOTICE TO PERSONS INTERESTED OF PAYMENT INTO COURT.

See Section 42 of The Trustee Act, 1893.

[*Title as in Form No.* 10.]

Take Notice that on the day of , 189 , A. B., of , the trustee of [*Will of &c.*], under the circumstances set forth in the affidavit of the said A. B., filed in this matter on the day of , 189 , transferred into Court the sum of £ New Consols, and paid into Court the sum of £ cash to the credit of in accordance with the provisions of the above-mentioned Act of Parliament.

And also take notice that you are named in the said affidavit as the person [*or* one of the persons] entitled to or interested in the said sums of New Consols and cash.

Dated this day of , 189 .

C. D.,

Solicitor for the

To

Form No. 14.

APPLICATION FOR PAYMENT OUT OF COURT OF A FUND PAID IN BY TRUSTEES.

See Section 42 of The Trustee Act, 1893.

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

MR. JUSTICE . 189 , , No. .

In the Matter of a Trust of a sum of £ New Consols (formerly New £3 per Cent. Annuities) bequeathed by the Will of deceased, dated the day of , upon trust for for life, with remainder to the children of and

In the Matter of The Trustee Act, 1893.

Let , of &c.; , of &c., wife of ; and , of &c., the trustees of the Settlement of , of &c.; and , of &c., the trustee of the said fund, within eight days after service of this summons on them respectively, inclusive of the day of such service, cause an appearance to be entered for them to this summons, which is issued upon the application of , of &c., as assignee of the shares of certain beneficiaries in the said fund for the determination of the following questions arising with reference to the said fund, and for such Order as hereinafter mentioned:—

1. What persons are, in the events which have happened, now entitled to the said fund in Court, and in what shares.

2. That such Order may be made as to payment out to such person or persons, or transfer to such separate accounts as the Court may think fit, of the whole or any part or parts of the said fund.

3. An Order as to how the costs of and incident to this application are to be borne.

Dated &c.

This summons was taken out by , of &c., the above-named applicant, in person.

The Defendants may appear hereto by entering appearances, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Defendants do not enter appearances within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Form No. 15.

FORM OF PETITION BY TRUSTEES FOR THE SANCTION OF THE COURT TO A DISPOSITION OF LAND AND MINERALS SEPARATELY.*

See Section 44 of The Trustee Act, 1893.

IN THE HIGH COURT OF JUSTICE,

CHANCERY DIVISION.

MR. JUSTICE

In the Matter of the Trusts of an Indenture of Settlement dated &c. [*or* of the Will of A. deceased, *or as the case may be*]

and

In the Matter of The Trustee Act, 1893.

To Her Majesty's High Court of Justice.

The Humble Petition of A. B. of &c. and C. D. of &c.

Showeth as follows:—

1. [*State the settlement or other instrument referred to in the title, showing that the petitioners have authority to dispose of the land,*

* It seems at least doubtful, in view of the terms of Order LV., Rule 2 (13) and (14), whether such an application as this under Section 44 of the Act should not be by summons instead of petition. This form is adaptable to such a mode of application if it be deemed preferable. *According to the "Annual Practice" such an application should be by petition, and this seems correct.*

and that there is no provision in such settlement or other instrument forbidding the disposition of the mines and minerals separately from the surface.]

2. [*State facts showing that a separate disposition of surface and minerals would be to the advantage of the persons beneficially entitled.*]

Your Petitioners therefore humbly pray that your Petitioners, or the survivor of them, or other the trustees or trustee for the time being of the said Indenture of Settlement of the day of , 18 [*or as the case may be*], may be at liberty to exercise all or any of the trusts, powers, and authorities of the said Indenture [*or as the case may be*], so as to dispose of the lands and hereditaments now held under and subject to the trusts of the said Indenture [*or as the case may be*], with an exception or reservation of the mines and minerals in and under the same, and with or without rights and powers incidental to the working, getting, and carrying away of such minerals, and so as to dispose of such mines and minerals, with or without such rights or powers as aforesaid, separately from the residue of the said lands and hereditaments, and in either case without prejudice to any future exercise of the said trusts, powers, and authorities with respect to the excepted mines and minerals or the undisposed of land.

Or that such other Order may be made in the premises as to your Lordship shall seem meet.

And your Petitioners will ever pray &c.

NOTE.—It is intended to serve this Petition* &c.

* As to the persons to be served with this Petition see "Daniell's Chancery Practice," 6th edition, pages 2236 and 2237.

Form No 16.

NOTICE under Order XVI., Rules 48 and 55, of the Rules of the Supreme Court, and Section 45 of The Trustee Act, 1893, by a Trustee Defendant for Contribution from, or Indemnity by, a Beneficiary who has Instigated or Consented to a Breach of Trust.*

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE

Between A. B. - - - *Plaintiff*,
and
C. D. and
E. F. - - - *Defendants.*

Notice filed 189 .

To the Defendant C. D. [*or* X. Y., *if not a party to the action*].

[*If addressed to a person not party to the action*, Take Notice that this Action has been brought by the Plaintiff against the Defendants as Trustees under &c. for breach of trust, *or as the case may be.*]

The Defendant E. F. claims to be entitled to contribution from you to the extent of [*state proportion of claim*] of any sum which the Plaintiff may recover against him on the ground that you are &c. [*or* indemnified by you against the claim for the said breach of trust and costs on the ground that you are a beneficiary under the said &c., and that the investment was made at your instigation (*or* with your consent in writing)].

And Take Notice that if you wish to dispute the Plaintiff's claim in this action as against the Defendants , or your liability to the Defendants , you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the Defendants , and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you pursuant to the Rules of the Supreme Court, 1883, Order XVI., Part VI.

(Signed)
or,
Solicitor for

Appearance to be entered at

* See remarks on this procedure in *re* Holt, *re* Rollason, Holt *v.* Holt ([1897] 2 Ch. 525).

Form No. 17.

APPOINTMENT BY DEED OF TRUSTEE UNDER SETTLED LAND ACTS.

See Section 47 of The Trustee Act, 1893.

This Indenture made &c. between A., of &c. [*surviving trustee*], of the one part, and B., of &c. [*new trustee*], of the other part.

[*Recite Will showing shortly the devise by way of settlement, and stating that Will contained no power of or trust for sale within the purview of the Settled Land Acts.*]

And whereas by an Order of the Chancery Division of the High Court of Justice, made &c. by the Hon. Mr. Justice , in the matter of the houses, lands, tenements, hereditaments, and premises situate in or near , and other the real estate whatsoever and wheresoever settled by the Will of , of , and in the matter of The Settled Land Act, 1882, the said A. and X. were appointed trustees under the said settlement for the purposes of the above-mentioned Act:

And whereas the said X. died on the day of :

And whereas the said A. is desirous of appointing the said B. to be a trustee under the said settlement in the place of X.:

Now this Indenture witnesseth that, in pursuance of the said desire, he, the said A., in the exercise of power in this behalf conferred upon him by The Trustee Act, 1893, and of every or any other power enabling him in this behalf, doth hereby appoint the said B. to be a trustee of the said settlement created by the said Will of the said deceased in the place of the said X., and jointly with him the said A. for the purposes of The Settled Land Acts, 1882 to 1890.

Form No. 18.

GENERAL FORM OF ORIGINATING SUMMONS. Order LIV., Rule 4 (*b*).

This Form should be used in applications under Rule 3 of Order LV. of the Rules of the Supreme Court.

IN THE HIGH COURT OF JUSTICE, [*Reference to Record.*]
CHANCERY DIVISION.
MR. JUSTICE .
*

Between A. B. - - - *Plaintiff*,
and
C. D. - - - *Defendant*.

Let , of , in the county of , within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of , of , in the county of , who claims to be [*state the nature of the claim*], for the determination of the following questions:—[*State the questions.*]

Dated the .

This summons was taken out by , of , solicitor for the above-named .

The Defendant may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Defendant does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

* If the question to be determined arises in the administration of an estate or a trust, entitle it also in the matter of the estate or trust.

Form No. 19.

ORIGINATING SUMMONS NOT INTER PARTES.

IN THE HIGH COURT OF JUSTICE, 18 . No. .

CHANCERY DIVISION.

MR. JUSTICE

In the Matter of the Trusts of the Will of A. B. [*or as the case may be*]

and

In the Matter of The Trustee Act, 1893.

Let , of , in the county of , within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of , of , in the county of , for an Order that [*state the object of the application*].*

Dated the .

To

This summons was taken out by , of , solicitor for the above-named .

The Respondent may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Respondent does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

* The Section or Sections of the Act under which the application is made should be stated.

Form No. 20.

NOTICE OF APPOINTMENT TO HEAR ORIGINATING SUMMONS.

Order LIV., Rule 4 (*d*).

[*Title &c. as in Form No.* 18 *or* 19, *as the case may be.*]

To [*insert the name of the Defendant or Respondent*].

Take Notice that you are required to attend the Judge [*or* Master] at the Chambers of Mr. Justice , at the Royal Courts of Justice, on the day of 18 , at o'clock in the noon, for the hearing of the originating summons issued herein on the day of 18 , and that if you do not attend in person or by solicitor at the time and place mentioned, such Order will be made and proceedings taken as the Judge [*or* Master] may think just and expedient.

(Signed)

Solicitor for the Plaintiff [*or* Applicant].

The Defendant may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.

NOTE.—If the Defendant does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Form No. 21.

APPLICATION FOR THE APPOINTMENT, UNDER THE JUDICIAL TRUSTEES ACT, 1896, OF A JUDICIAL TRUSTEE OF A TRUST FUND.

IN THE HIGH COURT OF JUSTICE, 189 . No. .

CHANCERY DIVISION.

MR. JUSTICE

In the Matter of the Trusts of [*or* about to be created by (*state by whom or manner of creation of trust*)]

and

In the Matter of The Judicial Trustees Act, 1896.

Let , of , in the county of , within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of , of , in the county of , for—

1. That , of , may be appointed a judicial trustee of the trust funds now subject to the said trust jointly with [*the present trustees, or otherwise as the case may be*].

2. That the messuages, tenements, lands, and hereditaments situate in [*place* (now subject to the trusts of the said)], and all other (if any) the lands and hereditaments so subject, may vest in the said [*judicial trustee*] and , as trustees thereof for the estate and interest now vested in .

3. That the right to call for a transfer of, and to transfer into their own names, the sum of , subject to the trusts of the said , and to receive the dividends now due and to accrue due thereon, may be vested in the said and , as the trustees thereof.

4. That the right to any chattels or debts or other things in action, subject to the trusts of the said , may be vested in the said and , as the trustees thereof.

5. That such directions may be given with reference to security by the said trustees and otherwise as the Court thinks fit.

6. That the costs of this application may be provided for.

Dated the

To

This summons was taken out by , of , solicitor for the above-named .

The Respondent may appear hereto by entering appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, London.*

NOTE.—If the Respondent does not enter appearance within the time and at the place above mentioned, such Order will be made and proceedings taken as the Judge may think just and expedient.

Form No. 22.

STATEMENT IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A JUDICIAL TRUSTEE.†

For heading see Form 21, *ante*, p. 303.

1. By Will [Indenture of Settlement &c. (*set out date, parties, and short particulars of Trust, and who are the beneficiaries*)].

2. It is proposed that , of , shall be appointed a judicial trustee of the trust created as aforesaid

* If the application is made by or on behalf of a person creating or intending to create a trust, the summons, subject to any direction of the Court, need not be served on any person (Rule 3, Sub-rule 2). See generally as to service Rule 3, *ante*, p. 262.

† If the applicant cannot gain the information necessary for making the required statement on any point he must mention the fact in his statement (Rule 4, Sub-rule 3).

[*state here short particulars of the reasons which lead to his appointment: e.g.* It has been found impossible to obtain the consent of any person to act as a trustee. It is necessary that a person acquainted with the letting of farms be appointed to superintend the management of the property].

3. It is proposed that the judicial trustee so to be appointed should be remunerated by payment to him of a commission not exceeding on the gross income of the trust estate.

4. The trust fund consists of [*state nature of fund*]. The gross income of the trust fund at present amounts to approximately the sum of £ and the expenses to a sum of £ annually. The capital value of the trust estate amounts approximately to the sum of £ .

5. The incumbrances affecting the trust estate are set forth in the following schedule:—

Property Charged.	Amount of Incumbrance.	How Secured.

6. It is [*or* is not] proposed that the judicial trustee should act alone. [The present trustee, , of , will act jointly with him.]

7. The deeds and documents, certificates of shares, and debentures relating to the trust estate are in the possession of .

8. The beneficiaries of the trust estate and their respective interests therein are as follows:—

9. [*State any special circumstances specially affecting the administration of the trust. See Rule* 4, *Sub-rule* 1 (*i*), *and Rule* 26, *Sub-rule* 2, *of the Judicial Trustee Rules*, 1897.]

Form No. 23.

AFFIDAVIT VERIFYING STATEMENT IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A JUDICIAL TRUSTEE.

For heading see Form 21, *ante*, p. 303.

I , of , make oath and say as follows:—

I have read the statement marked , now produced and shown to me, and I say that the statements therein contained are to the best of my knowledge, information, and belief true.

Sworn &c.

Form No. 24.

SUMMONS FOR THE REMOVAL OF A JUDICIAL TRUSTEE.

IN THE HIGH COURT OF JUSTICE. 189 . No. .

CHANCERY DIVISION.

MR. JUSTICE

In the Matter of the Trusts of

and

In the Matter of The Judicial Trustees Act, 1896.

Let [*A.B.* &c.] *

1. That , the judicial trustee of the trust funds and property, may be removed from being such trustee.

2. That may be appointed judicial trustee in his place.

3. That such vesting or other orders may be made herein as may be necessary for effectually vesting the trust estate in

and

4. That the costs of this application may be provided for.

Dated &c.

To

This summons was taken out by &c.

The Respondent may appear hereto &c.

* The Court can give directions as to what person or persons shall be served (Judicial Trustee Rules, 1897, Rule 20, Sub-rule 2).

Form No. 25.

SUMMONS FOR DISCONTINUANCE OF A JUDICIAL TRUSTEE OF A TRUST FUND.

IN THE HIGH COURT OF JUSTICE. 189 . No. .

CHANCERY DIVISION.

MR. JUSTICE

In the Matter of the Trusts of
and
In the Matter of The Judicial Trustees Act, 1896.

1. That there shall cease to be a judicial trustee of the trust funds comprised in the above trust.

2. [That may be appointed trustee of the said trust funds in place of the said]*

3. [*Order for vesting property, if necessary.*]

4. That the costs of this application may be provided for.

Dated &c.

To

This summons was taken out by &c.

The Respondent may appear hereto &c.

* This should only be inserted where the judicial trustee ceases on discontinuance to be a trustee of the trust, and the appointment of a new trustee is necessary.

APPENDIX VI.

PART I. OF THE LAND TRANSFER ACT, 1897

(Being the Sections relating to the Establishment of a Real Representative).

An Act to establish a Real Representative, and to amend The Land Transfer Act, 1875. [**6th August, 1897.**

This Act, by Section 25, came into operation on 1st January, 1898.

38 & 39 Vict. c. 87.

WHEREAS it is expedient to establish a Real Representative, and to amend The Land Transfer Act, 1875, in this Act referred to as "the principal Act."

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

Establishment of a Real Representative.

Devolution of legal interest in real estate on death.

1. (1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This Section shall apply to any real estate over which a person executes by Will a general power of appointment, as if it were real estate vested in him.

(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4) The expression "real estate," in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5) This Section applies only in cases of death after the commencement of this Act.

Section 1.—By this Section a Real Representative is established: that is to say, a legal entity is constituted in whom all the realty vested in a person prior to his or her decease will, upon such decease, become vested. The real representative of a deceased person is his or her personal representative or representatives, who by Section 24, Sub-section 2, are defined to be the executors or administrators of such person.

This devolution of "real estate" will not affect the following real estate:—

1. Real estate which is vested *jointly* in the owner and another person or persons. This real estate may be—

 (*a*) Trust property of which the deceased was *not* the *sole* trustee. If he were the sole trustee the land would devolve, under Section 30 of The Conveyancing and Law of Property Act, 1881, to his personal representative or representatives: *i.e.* the same persons to whom it would go under the Section now being discussed. In short, Section 30 of The Conveyancing and Law of Property Act, 1881, has been virtually repealed as from 1st January, 1898, by this Section of The Land Transfer Act, 1897, which now not only takes its place, but has a far wider scope, for the present Section extends not only to trust property vested in a sole trustee but to property beneficially owned.

 (*b*) Real estate vested beneficially *jointly* in the owner and another person or persons. In that case the survivor takes.

2. Land of copyhold tenure.

3. Land of customary freehold tenure (if an act or admission on the part of the lord is necessary to perfect the title of a purchaser from the customary tenant).

Where real estate is vested in two or more persons as tenants in common and one of such persons dies, his share will vest under the Act in his personal representative.

A testamentary disposition of real estate to which the Section relates is made unavailing to pass it; so that if a man devise his real estate to his executors, whom he appoints trustees, that devise is in effect nugatory, the land vesting by force of law in the personal representatives, irrespective of the devise.

Real estate over which a person executes by Will a *general power* of appointment is, by virtue of this Act, to pass to the personal representative.

The operation of the Section is, by Sub-section 5 of Section 1, confined to the deaths of persons taking place after the commencement of the Act (1st January, 1898).

It is to be noted that the Act contains no definition of "real estate."

The result of this enactment is to destroy, once and for all, one of the main distinctions which exist in English law between real and personal property, namely, that in the absence of a disposition by Will or settlement such real property descends at the death of the owner to *the heir*. This ceased to be so on 1st January, 1898.

Sub-section 3.—Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

This does not mean that probate of a Will must be granted before a dealing with the realty can be made by the executors nominated in the Will. Probate is only proof of the title of executors; the title itself is derived from the Will. It is probable, however, that after 1st January, 1898, purchasers of realty will insist on probate of any Will coming into effect after that date being granted, so as to complete the title to the land purchased by them.

The Section, it is conceived, applies only to the legal interest in real estate of which the deceased person was at his death seized or entitled, either in possession or in reversion or remainder, for an estate of inheritance in fee simple or for an estate *pur autre vie*. In the case of a tenant for his own life his legal interest ceases, of course, at his death, and, in the case of an estate tail, although legally speaking it is an estate of inheritance, the estate would, it is apprehended, notwithstanding this Section, pass to the heir in tail *per formam doni*.

Provisions as to administration.

2. (1) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment

of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

(3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate: provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

(4) Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir at law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by Rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Section 2, *Sub-section* 1.—Instead of real estate passing to a devisee it will, as above stated, now pass to the executor, and his assent to a devise will be necessary before it can vest in the devisee. This assent must not be given until the executor is satisfied that there are sufficient assets to pay the debts of the deceased without having recourse to the real property specifically devised.

"*The personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto.*"—These words make the executor or administrator a statutory trustee of the real estate, and will lead apparently to the result that the provisions of The Trustee Act, 1893, so far as they are applicable to the duties incident to the office of personal representative of a deceased person, will apply to such personal

representatives upon the death of the deceased, and all the provisions of that Act, including the power of appointment of new trustees, will apply to them on the estate being cleared (see *in re* Willey, W. N. [1890] 1, and Eaton *v.* Daines, W. N. [1894] 32).

"*Those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.*"—This, it is apprehended, does not mean that an actual deed of transfer from the personal representative to the person entitled to the realty is necessary, but only that the former's assent is needed, except, perhaps, where there is an intestacy. Under Section 3, after the administrator has fully administered, the heir at law in the case of an intestacy could apparently require a conveyance of the property to himself, upon which—but not before—he could enter and enjoy it. In practice some sort of formal written assent will, no doubt, be resorted to evidence the assent, even in the case of a devise.

In the case of registered land the assent must be in the prescribed form (see Sub-section 4 of Section 3).

Sub-section 2.—This Sub-section is important, as it assimilates the rules of administration of realty to those applying in the administration of chattels real. It contains a statement of the "powers, rights, duties, and liabilities," subject to which real estate is to be held in trust for those entitled to it.

One important exception is made in the application to real estate of the law as to chattels real, namely, that it shall not be lawful "for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

In respect of such real estate one executor or administrator will not, as is the case with regard to personalty, have power to sell or assign the property without the concurrence of the others, unless he obtain beforehand the consent of the Court.

It would be superfluous here to recapitulate the rules of administration as to chattels real, which are now made applicable to realty.

Sub-section 3.—This Sub-section preserves the existing law as to the order in which real and personal estate is respectively applicable in administration.

Sub-section 4.—This Sub-section apparently applies not only to administration in case of intestacy, but also to administration *cum testamento annexo*. When the Act comes into operation therefore, it is conceived that in cases where administration *cum testamento annexo* is necessary, and the testator has given his residuary personal estate to one person, and devised his real estate to another, the Court may in its discretion make the grant either jointly to the residuary legatee and the devisee of the real estate, or, having regard to the larger interest, solely to the residuary legatee or the devisee.

The Sub-section also expressly places the heir at law on an equal footing with the next of kin where an intestate dies possessed of real estate and his heir at

law is not one of his next of kin. In such a case it is apprehended that the Court will have power to make the grant either to the heir at law and the next of kin jointly, or to make a selection amongst the heir at law and the next of kin, or to make separate grants in respect of the real and personal estate (see Comyn's Dig.; Admon B. 6; 3 Bac. Abr. 55; and Fawtry *v.* Fawtry, 1 Salk. 36), or if the personal estate is of merely nominal value to grant to the heir alone with the object of giving the management of the estate to the person who has the beneficial interest (see Wetdrill *v.* Wright, 2 Phillim. 248).

A husband is entitled *jure mariti* to take out administration to his wife—a right in no way affected by the Married Women's Property Act where the wife dies without having made a testamentary disposition of her property (see *in re* Lambert's Estate, Staunton *v.* Lambert, 39 Ch. D. 626). Where a man dies intestate, leaving a widow, she is entitled to administration in preference to the next of kin, unless it can be shown by the next of kin that she is unfit, in which case the Court may pass her over (see Lambell *v.* Lambell, 3 Hagg. 568). These cases, however, will probably be held to be excluded from the operation of the Sub-section by the express reference to the heir at law and next of kin, on the principle that *expressio unius est exclusio alterius.* The heir at law will, however, it is conceived, in the case of an application for letters by a widow have an equal right with the next of kin to contest her right to a grant on the ground of unfitness.

Provision for transfer to heir or devisee.

3. (1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of

registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the Registrar to register the person named in the assent as proprietor of the land.

Section 3, *Sub-section* 1.—This Sub-section should be read in connection with Section 2. It is not very clear from the terms of it whether, when the administration is complete, a mere assent by the executor will, in the case of a devise, vest the realty in the devisee or not. But it is apprehended that it will be sufficient. In the case of an intestacy it will probably be held that a conveyance will be necessary to vest the realty in the heir at law entitled to it.

A conveyance will also be appropriate even in the case of a devisee where the personal representative exercises the power under this Section of charging the land with the payment of a sum of money. The money so charged will no doubt be such sums, or part of such sums, as the personal representatives desire to raise in the due course of administration.

"*All liabilities of the personal representatives in respect of the land shall cease &c.*"—It is apprehended that the meaning of these words is that on assent or conveyance subject to a charge for all moneys which the personal representatives are liable to pay out of the real assets in due course of administration, such representatives shall no longer be liable to be charged in respect of these assets, but the remedy of creditors shall be against the heir or devisee as the case may be.

Sub-section 2.—To bring the powers of this Sub-section into operation there must be—

1. Lapse of the period of one year from the date of the death of the owner.
2. A request of the person entitled to the land addressed to the representative, and failure on his part to convey.

After these conditions have been fulfilled the Court can on application order conveyance by or registration of the applicant as owner.

The application will doubtless be by summons entitled "In the Matter of the Will &c. and in the Matter of The Land Transfer Act, 1897."

Appropriation of land in satisfaction of legacy or share in estate.

4. (1) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive, save as otherwise directed by the Court.

(2) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3) In the case of registered land, the production of the prescribed evidence of an appropriation under this Section shall authorise the Registrar to register the person to whom the property is appropriated as proprietor of the land.

Section 4, Sub-section 1.—This Section gives the personal representatives power to appropriate the residuary estate (either realty or personalty) in satisfaction of a legacy or share of a residue. In such a case the property must be valued "in accordance with the prescribed provisions."

The prescribed provisions are those which can be made under Section 22, Sub-section 6 (*i*), of the Act.

Notice of any appropriation must be given to all persons interested, any of whom can apply to the Court (by summons it is presumed) with reference to the valuation. The Rules to be issued will doubtless deal with the mode of application.

This Sub-section however, it is conceived, gives, in the case of a mere pecuniary legacy payable out of personal estate, no right to the legatee to payment out of residuary real estate in the event of the personal estate being insufficient to meet his legacy, but simply enables the personal representative, where a legacy is payable out of the proceeds of the conversion of residuary real and personal estate, to appropriate in specie under the conditions laid down by the Sub-section.

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5. Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

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